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No. 04-__

IN THE
# Supreme Court of the United States

Carol Stavropoulos,
*Petitioner*,

v.

Evan Firestone et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should this Court grant certiorari to resolve the entrenched three-way circuit split regarding the type of employer conduct that constitutes actionable retaliation against a public employee under the First Amendment and 42 U.S.C. 1983?

2. Should this Court grant certiorari to resolve the circuit split regarding the type of employer conduct that constitutes an "adverse employment action" in a Title VII retaliation suit under 42 U.S.C. 2000e-3(a)?

## PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following parties appeared below and are respondents here: William Squires, W. Robert Nix, and the Board of Regents of the University Systems of Georgia.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Carol Stavropoulos respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The relevant opinions and orders of the district court (Pet. App. 19a-65a; *id.* 71a-83a) and court of appeals (*id.* 1a-18a; 361 F.3d 610 and Pet. App. 68a-70a) are reproduced in the Appendix, as is the Eleventh Circuit's order denying rehearing and rehearing en banc (Pet. App. 66a-67a).

## JURISDICTION

The judgment of the court of appeals was entered on February 25, 2004, and the court of appeals denied rehearing and rehearing en banc on October 14, 2004. Pet. App. 18a, 66a-67a. On January 4, 2005, Justice Kennedy extended the time to file this petition to and including February 11, 2005. App. No. 04-568. This court has jurisdiction pursuant to 28 U.S.C. 1254(1).

## RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Petition Appendix. See Pet. App. 84a-85a.

## STATEMENT

This is a case brought under 42 U.S.C. 1983 and Title VII alleging that respondents retaliated against petitioner for exercising her protected First Amendment rights. Respondents' acts of retaliation included a written reprimand, a negative performance review, false allegations of mental illness, an internal investigation designed to gather exclusively negative information about petitioner's work, and a decision not to renew petitioner's contract. These acts forced petitioner to spend tens of thousands of dollars simply to retain her job. But the Eleventh Circuit held that respondents' conduct neither qualified as "adverse employment actions" under Title VII nor constituted actionable retaliation under Section 1983. Pet. App. 12a, 18a. This Court should grant certiorari to resolve circuit conflicts

over both the statutory and constitutional issues, and to bring needed clarity and uniformity to this important area of law.

1. In 1993, petitioner was hired as an assistant professor in the University of Georgia's School of Art, where she was employed pursuant to a series of one-year contracts. Pet. App. 2a. She received excellent performance evaluations in 1993, 1994, and 1995. *Id.* 2a-3a.

At the beginning of 1995, petitioner served on a committee to recommend a candidate for a vacant position at the School of Art. Pet. App. 2a. Although petitioner believed – and the school's deans later agreed – that a female candidate was the best qualified, other committee members voted to recommend a male candidate, and the faculty accepted that recommendation. Pet. C.A. Br. 6-8. Petitioner and another committee member then filed a dissent from the recommendation and voiced concerns regarding the role of gender discrimination in the search process. Pet. App. 3a. Petitioner also assisted the female candidate in a complaint to the university regarding possible gender discrimination. *Ibid.*

In March 1995, immediately after the submission of the dissenting report, respondent Firestone – who served as the director of the School of Art – sent a memorandum to petitioner in which he chastised her for filing the dissent. Copies of the reprimand were sent to the school's deans. Pet. C.A. Br. 7. Respondent Firestone also verbally warned petitioner to curtail her "upstart attitude" and cautioned her to "hope for the best" in the tenure process, given her lack of "collegiality." *Id.* 7-9.

In June 1995, petitioner learned that the faculty had voted not to renew her contract. Pet. App. 3a. Petitioner complained to the dean of the School of Art that she had been treated unfairly during the non-renewal vote because she had voiced concerns about gender discrimination. *Ibid.* The dean agreed, and he asked respondent Firestone to explain the non-renewal vote, particularly in light of petitioner's three excellent performance reviews. See Pet. C.A. Br. 13. In response, Firestone embarked on an internal investigation of

petitioner, during which he solicited exclusively negative comments about her work. *Ibid.* Respondent Firestone submitted this "separate personnel file" to the deans, who expressed suspicion that the reliability of his findings had been tainted by the hiring committee incident. *Id.* 14-15. Consequently, the deans declined to accept the faculty vote, and petitioner's contract was renewed. Pet. App. 4a.

In March 1996, petitioner received her first negative performance evaluation from respondent Firestone, who later admitted that the evaluation may have been influenced by petitioner's actions during the hiring committee incident. Pet. C.A. Br. 19. That spring, petitioner was also the subject of a "third-year review," an evaluation, conducted by a committee, that is intended to gauge a professor's tenure prospects. Pet. App. 4a. Firestone appointed respondent Squires to chair the committee, which reviewed a variety of information related to petitioner's job performance. *Ibid.*

During the review process, Squires composed a memorandum – entitled "Understanding the Role Played by Illness Relative to Carol Stavropoulos' Performance of her Duties as a Faculty Member" – which falsely alleged that petitioner suffered from mental illness. Pet. App. 5a. The memorandum was distributed and read aloud at a review committee meeting, and committee members subsequently questioned petitioner about the allegations. Pet. C.A. Br. 22-23. Although petitioner vigorously denied that she suffered from a mental illness, the committee's report cited the allegations as "an exacerbating factor in [petitioner's] working relationships with others." Pet. App. 5a. The report concluded that "persistent and ongoing problems in the areas of teaching and service are jeopardizing Dr. Stavropoulos' progress towards promotion and tenure." *Id.* 6a.

In June 1996, the faculty, based on the third-year review committee's report and Firestone's "separate personnel file," voted not to renew petitioner's contract. Pet. C.A. Br. 26. Petitioner filed a grievance with the faculty senate, whose

grievance panel held a hearing in June 1997. Throughout the grievance process, petitioner was forced to retain counsel at her own expense. Pet. App. 6a. The grievance panel determined that the non-renewal vote was based on "retaliation for [petitioner's] conduct in connection with the 1995" hiring process. *Ibid.* Petitioner thus retained her job, although she was never compensated for the substantial financial losses that she suffered as a result of the retaliatory conduct. Pet. C.A. Br. 3, 31.

2. Petitioner subsequently filed this lawsuit. At issue here are two separate claims. The first, brought pursuant to the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, was dismissed on summary judgment on the ground that respondents' conduct did not amount to an actionable "adverse employment action" under Eleventh Circuit precedent. Pet. App. 39a.

The second claim, brought pursuant to 42 U.S.C. 1983, alleges that respondents Firestone, Squires, and Nix retaliated against petitioner – in violation of her First Amendment rights – because she had voiced concerns about gender discrimination in the hiring process. The district court rejected respondents' motion to dismiss on the basis of qualified immunity. Pet. App. 78a. It determined that petitioner's speech regarding the incidents of gender discrimination survived the *Pickering* test for protected activity by public employees: her speech clearly addressed a "matter of public concern" and was not disruptive to the workplace. *Id.* 74a-76a. The court thus allowed petitioner to proceed with her Section 1983 First Amendment retaliation claim against respondents in their individual capacities. *Id.* 83a. The Eleventh Circuit affirmed that holding on appeal. *Id.* 68a-70a. After discovery, respondents again moved for summary judgment, which the district court granted. It ruled as a matter of law that if petitioner had not suffered an adverse employment action for Title VII purposes – because she ultimately retained her job – then she also necessarily

failed to establish the required actionable retaliation to sustain her Section 1983 First Amendment claim. *Id.* 47a.

3. On appeal, the Eleventh Circuit affirmed. Like the district court, it reasoned that petitioner's Title VII claim was precluded because she had not suffered a cognizable "adverse employment action." Pet. App. 12a. The court also affirmed the dismissal of petitioner's Section 1983 retaliation claim. Acknowledging that its holding diverged from this Court's decision in *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 75 n.8 (1990), and holdings in several other circuits, the court rejected petitioner's contention that any action that is likely to chill an employee's exercise of constitutionally protected speech qualifies as "actionable retaliation" in the First Amendment context. Pet. App. 12a-18a.[1] Rather, the court held that, "[t]o be considered [actionable retaliation] * * * the complained-of action must involve an important condition of employment." *Id.* 13a. Under this strict test, petitioner's claims were dismissed. *Id.* 18a.

The court of appeals also briefly addressed whether respondents should be accorded qualified immunity on the Section 1983 claim. Reasoning that prior circuit precedent had not addressed what kinds of retaliation would give rise to Section 1983 liability, the court of appeals concluded that qualified immunity was appropriate because respondents' liability was not "clearly established." Pet. App. 18a.[2]

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[1] The court of appeals also indicated, Pet. App. 8a, that petitioner had waived any reliance on a theory of "retaliatory harassment," see *infra* Part I.A.2. (discussing Second Circuit standard). That holding is incorrect. But in any event, petitioner was subjected to retaliation in the form of several discrete acts, any one of which could individually qualify as actionable retaliation under the lesser standard adopted by five other circuits. See *infra* Part I.A.3.

[2] The issue of a causal connection between petitioner's speech and the retaliatory acts to which she was subjected remains to be determined on remand. The district court considered this issue only

The court of appeals denied rehearing and rehearing en banc. This petition followed.

## REASONS FOR GRANTING THE WRIT

### I. Certiorari Should Be Granted To Resolve The Entrenched Three-Way Circuit Conflict Over What Acts Constitute Actionable Retaliation Under The First Amendment.

There is an entrenched and widely acknowledged circuit conflict over what constitutes actionable retaliation for the purposes of a First Amendment claim under Section 1983. In the wake of this Court's decision in *Rutan*, the courts of appeals have adopted three inconsistent legal standards, which are outcome determinative in a large body of cases. Because the question determines the rights of public employees throughout the United States, such a conflict is untenable. This case presents the ideal vehicle to resolve the question presented because the Eleventh Circuit's ruling on whether the respondents' acts constituted actionable retaliation dictated the case's ultimate result. Finally, certiorari is also warranted because the decision below is wrong on the merits.

#### A. The Courts of Appeals Are Intractably Divided Over the Question Presented

As the Eleventh Circuit and other courts have acknowledged, the circuits are split over the threshold of harm that must be alleged to prevail on a First Amendment retaliation claim.[3] See Pet. App. 14a n.8; *Pierce* v. *Texas*

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in the narrow context of the 1996 denial of petitioner's request for early tenure and promotion, see Pet. App. 51a-52a, and the court of appeals bypassed the question entirely, instead directly addressing whether the individual respondents' actions constituted actionable retaliation. *Id.* 12a-18a.

[3] Although opinions in all of the circuits sometimes use the term "adverse employment action" in First Amendment retaliation cases, the courts define that term very differently. Compare, *e.g.*, *Coszalter* v. *City of Salem*, 320 F.3d 968, 970 (CA9 2003)

*Dep't of Crim. Just.*, 37 F.3d 1146, 1149 & n.1 (CA5 1994) (noting that its standard for actionable retaliation conflicts with that of D.C. Circuit); *Lybrook* v. *Members of Farmington Mun. Schs. Bd. of Educ.*, 232 F.3d 1334, 1340 n.2 (CA10 2000) (noting conflict between the circuits on magnitude of harm required to be actionable); *Cole* v. *Me. Sch. Admin. Dist. No. 1*, No. 03-205-B-W, 2004 U.S. Dist. LEXIS, at *20-*24 (D. Me. Dec. 3, 2004) (noting conflict between the Seventh, Ninth, and Fifth Circuits on what actions are sufficient to constitute an actionable wrong).

1. Three circuits have adopted a particularly rigorous, pro-defendant standard. The Eleventh Circuit held in this case that "[t]o be considered an [actionable retaliation] in a First Amendment retaliation case, the complained-of action must involve an *important condition of employment*." Pet. App. 13a (emphasis added) (citation omitted).[4] The court listed

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("'adverse employment action" is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech), with *Pierce*, 37 F.3d 1146, 1150 (CA5 1994) ("Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands."). This petition thus focuses on the kinds of retaliatory conduct that will support a First Amendment retaliation claim – or, put another way, what constitutes "actionable retaliation" for First Amendment purposes.

[4] Although the decision below suggested that conduct "likely to chill the exercise of constitutionally protected speech" would also be actionable, the court never applied this standard to the respondents' conduct. Pet. App. 12a. Indeed, it later indicated that "an employee complaining of First Amendment retaliation must show more than her subjective belief that the employer's action was likely to chill her speech." *Id.* 15a. Taking their cue from the latter language, district courts in the Eleventh Circuit have followed the major holding of the decision below – *viz.*, that conduct is actionable only when an important condition of employment is altered. See *Alexander* v. *Chattahoochee Valley Cmty. Coll.*, 345 F. Supp. 2d 1306, 1308 (M.D. Ala. 2004); *Portera* v. *State of Ala. Dep't of Fin.*, 322 F. Supp. 2d 1285, 1291 (M.D. Ala. 2004).

"discharges, demotions, refusals to hire or promote, and reprimands" as examples of actions that would meet the threshold for actionable retaliation. *Id.* 14a. The court further held that employers are shielded from liability so long as their actions have "no impact on an important condition of [the employee's] job, such as * * * salary, title, position, or job duties." *Id.* 17a. Finally, the Eleventh Circuit clearly acknowledged that some retaliatory actions might not survive summary judgment "even though they may have had the effect of chilling [the employee's] speech." *Id.*

The Fifth and Eighth Circuits apply the same rule. See, *e.g.*, *Pierce*, 37 F.3d at 1149-50 (limiting actionable retaliation to "discharges, demotions, refusals to hire, refusals to promote, and reprimands" and noting that some conduct may not be actionable even if it "may have had the effect of chilling * * * protected speech"); *Jones* v. *Fitzgerald*, 285 F.3d 705, 713 (CA8 2002) (actionable retaliation "requires a tangible change in duties or working conditions that constitutes a material disadvantage" to the employee (citation and internal quotation marks omitted)).

Applying this stringent standard, the Eleventh Circuit deemed several retaliatory acts not actionable despite their detrimental effects. For example, in retaliation for petitioner's report of gender discrimination in the 1995 hiring process, respondent Firestone sent her a disparaging letter, compiled a dossier of critical letters, and encouraged "faculty members with negative things to say" about petitioner to speak with the committee responsible for her third-year review. Pet. App. 16a. Furthermore, respondent Squires falsely alleged that petitioner suffered from mental illness and that this ailment hindered her job performance. *Id.* 6a.

The Fifth and Eighth Circuits have rejected equally substantial claims. The Fifth Circuit has held that subjecting an employee to investigations, videotaping, polygraph tests, transfers, and disciplinary measures did not constitute actionable retaliation, *Pierce*, 37 F.3d at 1148-50; nor did

negative performance reviews and a failure to grant merit-based raises, *Harrington* v. *Harris*, 118 F.3d 359, 365 (1997). Similarly, the Eighth Circuit has held that involuntary transfers, negative reports in a personnel file, and two internal investigations do not constitute actionable retaliation. *Fitzgerald*, 285 F.3d at 714-15. That court also held that denial of a merit-based bonus and the placement of an employee on "secret probation" were not actionable. *Bechtel* v. *City of Belton*, 250 F.3d 1157, 1162 (2001).

2. The Second Circuit has adopted a unique rule: it holds that actionable retaliation may be demonstrated not only by "the classic examples of discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand," but also by showing that "using an objective standard," "the total circumstances of her working environment changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace." *Phillips* v. *Bowen*, 278 F.3d 103, 109 (2002). Under this retaliatory harassment theory, "otherwise minor incidents that occur often and over a longer period of time may be actionable if they attain the critical mass of unreasonable inferiority," *ibid.*, such that plaintiffs may prevail on an actionable retaliation claim by showing an aggregation of incidents that individually fall short of demotion, termination, or the like.[5]

3. By contrast, the majority rule – followed by eight circuits – is that any non-trivial retaliatory action will support a First Amendment claim. See, *e.g.*, *Smith* v. *Fruin*, 28 F.3d

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[5] For example, one district court sustained a First Amendment retaliation claim that alleged a cover-up, unwarranted negative job evaluations and disciplinary notices, and the "implanting of a false charge against plaintiff in the mind of a high-ranking school district official." *Branch* v. *Guilderland Cent. Sch. Dist.*, 239 F. Supp. 2d 242, 244 (N.D.N.Y. 2002). Recently, another district court held that a negative evaluation and a written reprimand could individually constitute actionable retaliation. *Kantha* v. *Blue*, 262 F. Supp. 2d 90, 103 (S.D.N.Y. 2003).

646, 649 n.3 (CA7 1994) ("even minor forms of retaliation can support a First Amendment claim"); *Rivera-Jiménez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004) (same); *Tao* v. *Freeh*, 27 F.3d 635 (CADC 1994) (retaliatory action "need not be as significant as the denial of a promotion to raise a constitutional claim"); *Ulrich* v. *City and County of San Francisco*, 308 F.3d 968, 977 (CA9 2002). These courts often formulate this standard as an inquiry into whether the retaliatory acts threaten to chill, inhibit, or deter employee speech.[6]

Thus, the Seventh Circuit has held that giving an experienced police officer a sham surveillance assignment was sufficient to constitute actionable retaliation. *Fruin*, 28 F.3d at 649. The Ninth Circuit has found a variety of employer actions to constitute actionable retaliation, including investigations, *Ulrich*, 308 F.3d at 977; temporary suspensions, *Anderson* v. *Cent. Point Sch. Dist. No. 6*, 746 F.2d 505 (1984); reassignment to a different position, *Allen* v. *Scribner*, 828 F.2d 1445 (1987); and rescinding an appointment to a new post, *Salem* v. *Terhune*, 72 Fed. Appx. 670 (2003). Courts in other circuits applying the majority rule have been equally sensitive to the deterrent effects of adverse and retaliatory conduct by employers.[7]

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[6] See, *e.g.*, *Suppan* v. *Dadonna*, 203 F.3d 228, 235 (CA3 2000); *Goldstein* v. *Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (CA4 2000); *Farmer* v. *Cleveland Pub. Power*, 295 F.3d 593, 602 (CA6 2002); *Spiegla* v. *Hull*, 371 F.3d 928, 941 (CA7 2004); *Coszalter*, 320 F.3d at 974-75; *Andersen* v. *McCotter*, 100 F.3d 723, 727 (CA10 1996).

[7] See, *e.g.*, *Cole*, 2004 U.S. Dist. LEXIS at *25-*26 (written reprimand and letter threatening termination suffice for actionable retaliation); *Suppan*, 203 F.3d at 234-35 (harassment and retaliatory promotion rankings held actionable retaliation); *Saleh* v. *Upadhyay*, 11 Fed. Appx. 241, 256 (CA4 2001) (threat to professor's tenure satisfies standard for actionable retaliation); *Farmer*, 295 F.3d at 602 (suspensions, reduction of duties, denied transfers, and

### B. The Court's Intervention Is Needed to Resolve This Entrenched and Intolerable Circuit Split.

This Court's intervention is necessary because the courts of appeals' competing legal rules are well developed and unlikely to converge in future litigation. The Seventh Circuit first articulated its test ("whether the adverse action taken by the defendant is likely to chill the exercise of constitutionally protected speech") in 1979 and has consistently applied that rule for a quarter-century. See, *e.g.*, *McGill* v. *Bd. of Educ. of Pekin Elementary Sch.*, 602 F.2d 774, 780 (1979); *Spiegla* v. *Hull*, 371 F.3d 928, 941 (2004). Similarly, for more than ten years the Fifth Circuit has repeatedly applied a contrary rule, holding that retaliatory actions are not adverse employment actions even when they have the effect of chilling protected speech. See, *e.g.*, *Pierce*, 37 F.3d at 1150; *Breaux* v. *City of Garland*, 205 F.3d 150, 157 (2000). Several other circuits have also repeatedly adhered to their positions on this issue.[8]

Only this Court's intervention can bring uniformity to the law for the further reason that the disagreement rests on fundamentally inconsistent interpretations of this Court's precedent. In *Rutan*, this Court held that the First Amendment prohibits public employers from taking adverse action against public employees because of their political affiliations. 497 U.S. at 65. The Court reasoned that because

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negative performance evaluations could constitute actionable retaliation); *Schuler* v. *City of Boulder*, 189 F.3d 1304, 1309-10 (CA10 1999) (reprimands, involuntary transfers, and bad performance evaluations constitute actionable retaliation).

[8]Courts in the Fourth, Sixth, and Ninth Circuits have consistently applied the majority rule, see, *e.g.*, *Goldstein*, 218 F.3d at 356; *DiMeglio* v. *Haines*, 45 F.3d 790, 806-07 (CA4 1995); *Farmer*, 295 F.3d at 602; *Bloch* v. *Ribar*, 156 F.3d 673, 678 (CA6 1998); *Coszalter*, 320 F.3d at 975; *Thomas* v. *Carpenter*, 881 F.2d 828, 829-30 (CA9 1989), while courts in the Eighth Circuit have continued to apply the minority rule, see, *e.g.*, *Fitzgerald*, 285 F.3d at 713-15; *Bechtel* v. *Belton*, 250 F.3d 1157, 1162 (CA8 2001);

"deprivations less harsh than dismissal" could "nevertheless press [public] employees and applicants to conform their beliefs and associations to some state-selected orthodoxy," such deprivations were impermissible. *Id.* at 75. As the Court noted, the First Amendment "protects state employees * * * from even an act of retaliation as trivial as failing to hold a birthday party for a public employee when intended to punish her for exercising her free speech rights." *Id.* at 75 n.8 (quoting *Rutan* v. *Republican Party of Illinois*, 868 F.2d 943, 954 n.4 (CA7 1989)) (alteration and internal quotation marks omitted). Accordingly, even minor acts that stem from a forbidden animus are actionable under the First Amendment.

Despite the guidance provided by this Court in *Rutan*, some circuits (including the Eleventh Circuit in this case) deem *Rutan*'s description of the threshold for retaliation to be dicta and continue to rely on their pre-existing precedent applying a more rigorous standard. See, *e.g.*, Pet. App. 14a n.8; *Pierce*, 37 F.3d at 1146, 1150 & n.1. By contrast, other circuits have relied on *Rutan*'s broad deterrence language to establish a lower threshold for actionable retaliation. See, *e.g.*, *Tao*, 27 F.3d at 639 (citing *Rutan* as holding that minor forms of retaliation can be actionable), *Kirby* v. *City of Elizabeth City*, 388 F.3d 440, 450 n.8 (CA4 2004) (citing *Rutan* for the proposition that "it is well established that even minor retaliation can have a chilling effect on future expression"); *Fruin*, 28 F.3d at 649 n.3 (noting that "minor forms of retaliation * * * may have just as much of a chilling effect on speech as more drastic measures").

Uniformity is particularly important when, as here, constitutional rights are involved. The First Amendment should provide the same protection to government employees everywhere. But as a result of this circuit split, government employees in Atlanta enjoy substantially less protection than those in Chicago, solely because of where they happen to live. Certiorari is warranted to resolve this disparity.

### C. Petitioner's Case Is an Ideal Vehicle for Determining the Contours of Actionable Retaliation.

The number and variety of undisputed retaliatory acts taken against petitioner makes her case an ideal vehicle for establishing a uniform threshold for actionable retaliation.

Under the majority rule, petitioner states a claim under Section 1983 if she alleges *any* non-trivial "deprivation * * * that is likely to deter the exercise of free speech." *Power* v. *Summers*, 226 F.3d 815, 820 (CA7 2000). In fact, petitioner has alleged at least *five* such acts by respondent, see *infra*, each of which would individually qualify as actionable retaliation under the majority rule, yet the Eleventh Circuit held that none was actionable. The question of what constitutes actionable retaliation is thus squarely outcome determinative in this case.

Moreover, the case presents an ideal record on which to decide the question presented. Each of the acts alleged by petitioner is clearly established in the record and undisputed by respondents. Because the case delineates four types of employer conduct that the district courts regularly confront, it provides an excellent opportunity for this Court to illustrate concretely when such conduct is actionable under Section 1983. By contrast, the Court in *Rutan* dealt largely in hypotheticals that some circuits dismissed as dicta.

1. Respondent Firestone committed an act of actionable retaliation by sending petitioner a letter in which he chastised her for dissenting from the hiring committee's decision and making accusations of gender discrimination. The letter was copied to petitioner's supervisors to alert them to what Firestone considered petitioner's "inappropriate" behavior, and it was accompanied by verbal threats that petitioner could only "hope for the best" in the tenure process, given her lack of "collegiality," and that she should curtail her "upstart attitude." Pet. C.A. Br. 7-9. The Eleventh Circuit held that the letter was not actionable retaliation because it had "no

impact on an important condition of [petitioner]'s job, such as her salary, title, position, or job duties." Pet. App. 17a.

By comparison, such written warnings would be actionable under the majority rule because they have "the potential to 'press state employees * * * to conform their beliefs and associations to some state-selected orthodoxy.'" *Aquavia* v. *Goggin*, 208 F. Supp. 2d 225, 233 (D. Conn. 2002) (alteration in original) (quoting *Rutan*) (formal reprimand, placed in personnel file, constitutes actionable retaliation).[9] See also *Schuler* v. *City of Boulder*, 189 F.3d 1304, 1310 (CA10 1999) (written warning constitutes actionable retaliation); *Glass* v. *Dachel*, 2 F.3d 733, 742 (CA7 1993) (same); *Cole*, 2004 U.S. Dist. LEXIS 24746, at *26 (warning letter can constitute actionable retaliation).

2. Respondent Firestone also engaged in actionable retaliation when he compiled a "separate personnel file" about petitioner, ostensibly to address Assistant Dean Morrow's concern that a faculty vote not to renew petitioner's contract had been motivated by dislike for petitioner's criticism of the department. Pet. C.A. Br. 13. Firestone's internal investigation consisted of soliciting exclusively negative statements about petitioner's past work in an admitted attempt to justify the non-renewal vote and ensure that petitioner was fired. *Id.* 15. After reviewing the file, Morrow determined that the file's negative portrayal of petitioner was "colored by intervening events" and that the "discrepancy" between petitioner's positive evaluations and the results of Firestone's investigation could be explained by "the whole issue of the [1995 hiring] search." *Id.* 14-15. Because the "separate personnel file" did not have an "impact on an important condition of [petitioner]'s job," the court below held that the file did not amount to actionable retaliation. Pet. App. 17a.

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[9] "Reprimands" are included on the short list of acts that qualify as actionable retaliation under the minority rule. However, no court in any of the minority circuits has ever held that a written reprimand, standing alone, qualifies as actionable retaliation.

By contrast, under the majority rule, an "investigation" designed to "revoke * * * privileges" is "more than trivial" and constitutes actionable retaliation. *Ulrich* v. *City and County of San Francisco*, 308 F.3d 968, 977 (CA9 2002). See also *Salem* v. *Terhune*, 72 Fed. Appx. 670, 672 (CA9 2003) (investigation based on false accusations constitutes actionable retaliation); *Rivera-Jiménez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004) (internal investigation constitutes actionable retaliation); *Gumm* v. *Flickenger*, No. 03-C-8174, 2004 U.S. Dist. LEXIS 19700, at *29 (N.D. Ill. Sept. 29, 2004) ("invasive and extensive investigations" constitute actionable retaliation).

3. Petitioner also suffered actionable retaliation when respondent Squires falsely accused her of suffering from a mental illness, detailed those allegations in a memorandum that he distributed to the third-year review committee, and read aloud portions of the memorandum to the committee. The question of petitioner's mental illness was specifically raised in the committee's report, which was presented to the faculty before the 1996 non-renewal vote. Pet. C.A. Br. 23. The Eleventh Circuit held that the false accusations were "not substantial enough to be actionable." Pet. App. 17a.

Respondent Squires's false accusation qualifies as actionable retaliation under the majority rule. Several courts have stated specifically that "[l]esser retaliation, such as * * * false accusations," may constitute actionable retaliation. *DeGuiseppe* v. *Village of Bellwood*, 68 F.3d 187, 191 (CA7 1995); *Barrett* v. *Harrington*, 130 F.3d 246 (CA6 1997), cert. denied, 523 U.S. 1075 (1998) (judge's false accusations to the media that attorney investigating her bench record was stalking her established a claim of First Amendment retaliation).

4. Respondent Firestone's subjection of petitioner to a negative performance evaluation, Pet. C.A. Br. 17, also constitutes actionable retaliation insofar as he has admitted that petitioner's public accusations of gender discrimination

formed part of the basis for that negative evaluation. *Id.* 19. Although the opinion below did not directly confront the question, other courts in the Eleventh Circuit have held that a negative evaluation, standing alone, does not constitute actionable retaliation. *Merriweather* v. *Alabama Dep't of Pub. Safety*, 17 F. Supp. 2d 1260, 1275 (D. Ala. 1998).

Under the majority rule, a negative performance evaluation can be considered actionable retaliation. See, *e.g.*, *Schuler* v. *City of Boulder*, 189 F.3d 1304, 1310 (CA10 1999) (low score on performance evaluation constitutes actionable retaliation). See also *Ulrich* v. *City and County of San Francisco,* 308 F.3d 968, 977 (CA9 2002) (filing of an written adverse written report with local review board about plaintiff's job performance amounted to actionable retaliation); *Kantha*, 262 F. Supp. at 103 (negative performance evaluation constitutes actionable retaliation); *Quinn* v. *Village of Elk Grove Bd. of Fire & Police Comm'rs*, No. 01-C-8504, 2002 U.S. Dist. LEXIS 24654, at *14 (N.D. Ill. Dec. 24, 2002) ("punitive act short of discharge" sufficient to sustain a First Amendment retaliation claim); *Axel* v. *Apfel*, 171 F. Supp. 2d 522, 527-28 (D. Md. 2000) (Fourth Circuit considers poor performance evaluations actionable retaliation).

5. Finally, the instances of actionable retaliation perpetuated by Squires and Firestone directly contributed to a faculty vote not to renew petitioner's contract, and thus amounted to actionable retaliation because they imposed considerable costs on petitioner. Pet. C.A. Br. 29. Petitioner was forced to appeal the non-renewal vote to an internal grievance committee, a lengthy process that cost her "tens of thousands of dollars" in legal fees. *Id.* 3. The committee eventually vindicated petitioner – finding both the vote and the retaliation "improper" and motivated by petitioner's conduct in connection with the 1995 hiring process – but petitioner was never reimbursed for her legal fees. *Id.* 30-31. Although the decision below did not address this issue in the First Amendment context, it dismissed these costs as

"insubstantial" when discussing the Title VII claim. Pet. App. 11a.

Under the majority rule, the forced expenditure of significant amounts of time or money to obtain or retain benefits may be considered actionable retaliation. The D.C. Circuit, for example, has held that requiring an employee to re-submit new materials in support of her promotion application – which involved an additional twenty-seven hours of work – is sufficient to implicate First Amendment concerns. *Tao* v. *Freeh*, 27 F.3d 635, 639 (1994).

**D. Certiorari Is Further Warranted Because This Issue Is Both Frequently Recurring and Important.**

This Court should grant certiorari because the lower courts are frequently presented with First Amendment retaliation claims that require them to consider whether particular actions constitute "actionable retaliation." Under current law, these suits are governed by conflicting and uncertain standards.

The number of Section 1983 retaliation claims is substantial: over fifty cases in the courts of appeals, as well as many more in the district courts, have directly addressed this issue, often with widely varying results. See *supra* Part I.A-C. The high volume of litigation is not surprising, given that more than nineteen million Americans – almost all of whom are protected from retaliation by this Court's First Amendment doctrine – currently work for state and local government entities. *The Employment Situation*, U.S. Bureau of Labor Statistics (Dec. 2004).

Moreover, in recent years the frequency of litigation has greatly increased. In 1989, Judge Posner remarked that "claims of politically motivated personnel action in public employment abound in this circuit." *Piecyznski* v. *Duffy*, 875 F.2d 1331, 1332 (CA7 1989). Since then, the number of retaliation claims has increased, especially after this Court recognized in *Rutan* that a retaliation claim can be based upon

retaliatory actions short of firing. 497 U.S. 62 (1990). And this Court's holdings in *Board of County Commissioners* v. *Umbehr*, 518 U.S. 668 (1996), and *O'Hare Truck Service* v. *Northlake*, 518 U.S. 712 (1996), that government contractors' speech receives the same protection as that of "traditional" government employees have further expanded the pool of employees protected from retaliation – and, thus, the number of potential retaliation claims.

The question of what constitutes "actionable retaliation" is also important because it arises in numerous contexts. The petitioner in this case was the victim of retaliation because she voiced concerns about gender discrimination and assisted a rejected job candidate in raising discrimination claims. Pet. App. 3a. Other cases have involved retaliation against employees based on their support for political candidates or parties that their supervisors opposed. See *Rutan*, 497 U.S. at 67; *Phillips*, 278 F.3d at 106-07. Still other cases were brought by employees who were retaliated against after they exposed corruption or public health hazards. See, *e.g.*, *Coszalter*, 320 F.3d at 970-71 (employee who exposed ongoing sewage discharge into residential streets); *Farmer*, 295 F.3d at 598 (employee who alleged political nepotism); *Spiegla*, 371 F.3d at 933-34 (employee who reported highly suspicious conduct by his supervisors); *Dahm* v. *Flynn*, 60 F.3d 253, 255 (CA7 1994) (employee who testified against her supervisor in an internal investigation); *Bechtel* v. *Belton*, 250 F.3d 1157, 1158 (CA8 2001) (fireman who criticized department's preparedness and condition of equipment).

Finally, this issue is important in light of its broader implications for free speech. This Court has repeatedly emphasized that a central purpose of the First Amendment is to prevent government conduct that chills expression.[10]

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[10] See *New York Times* v. *Sullivan*, 376 U.S. 254, 279 (1964) (defamation standard that did not include a malice requirement would "dampen[] the vigor and limit[] the variety of public debate," and would lead to "self-censorship" by "would-be critics

Government conduct that chills the expression of government employees on issues of public concern is particularly undesirable, given that those employees are often in the best position to observe and report wrongdoing. See *Waters* v. *Churchill*, 511 U.S. 661, 674 (1994). In holding that many retaliatory actions will not constitute "actionable retaliation" for First Amendment purposes "even though they may have had the effect of chilling * * * speech," Pet. App. 17a (quoting *Pierce*, 37 F.3d at 1150), the minority rule applied by the Eleventh Circuit threatens to substantially curtail the free speech of government employees.

**E. The Eleventh Circuit's Decision Is Wrong on the Merits.**

1. Certiorari is also warranted because the Eleventh Circuit's holding that "actionable retaliation" requires a change in an important condition of employment is erroneous.

First, the decision below is contrary to both the text of Section 1983 and this Court's decisions construing that vital civil rights statute. The statute creates a right of action for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Notably, it does not limit such claims to instances in which the victim suffers particularly egregious injuries. This Court has thus repeatedly recognized that "[a] broad construction of § 1983 is compelled by the statutory language." *Dennis* v. *Higgins*, 498 U.S. 439, 443 (1991) (internal citations omitted). "The legislative history of the section also suggests that as a remedial statute, it should be liberally and beneficently construed." *Ibid.* (internal quotations and citation omitted).

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of official conduct"); *Reno* v. *ACLU*, 521 U.S. 844, 872 (1997) (noting that the Communications Decency Act had an "obvious chilling effect on free speech"); *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958) (mandated disclosure of membership lists would have an impermissible "deterrent effect" on the free exercise of members' association rights).

The decision below is also contrary to this Court's line of cases regarding government employees' speech. Those decisions are fundamentally inconsistent with the notion that retaliatory actions which admittedly chill protected speech nonetheless do not constitute actionable retaliation under Section 1983. In *Rutan*, for example, while holding that retaliation can include adverse actions short of firing, this Court focused not on the *form* of a retaliatory action, but on whether it "pressur[es] employees to discontinue the free exercise of their First Amendment rights." 497 U.S. at 79.

The Eleventh Circuit's ruling is further contrary to the purpose underlying this Court's decision in *Pickering* v. *Board of Education*, in which this Court held that government employees cannot be fired for speaking about matters of public importance and emphasized "the public interest in having free and unhindered debate on matters of public importance – the core value of the Free Speech Clause of the First Amendment." 391 U.S. 563, 573 (1968). The Eleventh Circuit's ruling gives government officials too much latitude to retaliate against workers on the basis of their protected speech, thereby discouraging the "free and unhindered debate" that is at the core of *Pickering*.

Finally, the Eleventh Circuit is wrong on the merits because in other areas of constitutional law, this Court has never placed a heightened requirement of injury on plaintiffs in Section 1983 cases. In *Carey* v. *Piphus*, this Court held that even a plaintiff who cannot prove that he has suffered any actual damages can state a claim for deprivation of procedural due process, "because of the importance to organized society that procedural due process be observed." 435 U.S. 247, 266-67 (1978). Similarly, in *Wisconsin* v. *Constantineau*, this Court held unconstitutional a statute that, without any procedural protections, allowed city officials to prohibit liquor stores from selling to certain people. 400 U.S. 433 (1971). The plaintiff, who had been given no notice or hearing, was included in a "do not sell" notice that was sent to all liquor stores in the city. *Id.* at 435. This Court held that

the plaintiff's procedural due process rights were implicated, even though the injury was entirely nonpecuniary and only related to his "good name, reputation, honor, or integrity." *Id.* at 437. See also *Nixon* v. *Herndon*, 273 U.S. 536, 540-41 (1927) (deprivation of right to vote actionable notwithstanding lack of quantifiable injury). There is no reason to treat the First Amendment differently.

2. The courts of appeals that apply the minority rule attempt to justify their holdings on the ground that more broadly permitting retaliation claims under Section 1983 would "open the floodgates" to frivolous litigation. See, *e.g.*, *Breaux* v. *City of Garland*, 205 F.3d 150, 157 (CA5 2000). That argument is meritless. As an initial matter, there is no indication that circuits applying the majority rule face more litigation than those applying the minority rule.[11] Also, even those circuits that apply the majority rule still require plaintiffs to prove that the defendants' acts were non-trivial. See, *e.g.*, *Thomsen* v. *Romeis*, 198 F.3d 1022, 1027 (CA7 2000). Additionally, some circuits use an objective test that asks whether a person of ordinary firmness would be deterred from exercising the protected speech, see, *e.g.*, *Farmer*, 295 F.3d at 602; *Suppan* v. *Dadonna*, 203 F.3d 228, 235 (CA3 2000) – a rule which ensures that government officials will not be held liable to overly sensitive employees. Finally, in the long run the majority rule may well reduce the volume of litigation by deterring retaliation and promoting better compliance by employers.

Alternatively, the decision below asserted that its high standard for "actionable retaliation" is essential to "satisfy principles of justiciability" because a contrary rule would not

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[11] For example, in the courts of the Sixth and Seventh Circuits – which apply the majority rule – petitioner's research located thirty and fifty-four First Amendment retaliation cases, respectively. In the courts of the Eleventh and Fifth Circuits, which apply the minority rule, there were thirty-two and fifty-four retaliation cases, respectively.

satisfy the "injury-in-fact requirement of federal justiciability law." Pet. App. 15a. That argument is meritless as well. "Article III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986) (citation and internal quotation omitted). That standard is easily met in this case, because tens of thousands of dollars in attorneys' fees, allegations of mental illness, negative performance reviews, and emotional harm and damage to reputation clearly constitute "actual or threatened injury."

The Eleventh Circuit cited *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972), for the proposition that "allegations of a subjective 'chill'" are not enough to meet justiciability requirements. Pet. App. 15a. *Laird* involved plaintiffs who alleged that the "very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights." *Laird*, 408 U.S. at 13. This Court noted that the claims were merely "speculative apprehensiveness," because they involved nothing more than fears of *future* misuse of the information." *Ibid.* In contrast, this case involves tangible adverse actions by respondents that were taken in direct response to petitioner's protected speech – direct retaliation that is clearly more concrete than *Laird*'s "speculative apprehensiveness."

3. Neither the district court nor respondents' own appellate brief even implied that the individual respondents were entitled to qualified immunity on the ground that the law was not clearly established. The Eleventh Circuit, in a passing remark, nonetheless indicated that they enjoyed immunity, reasoning that respondents could not be held liable under Section 1983 because "there was no clearly established law to put them on notice that their actions were a violation." Pet. App. 18a. The Eleventh Circuit's holding, which squarely conflicts with its sister circuits, thus provides a further basis for review.

The panel below acknowledged that this case was the Eleventh Circuit's first opportunity to decide the standard of liability on a Section 1983 First Amendment retaliation claim. Pet. App. 13a. Although at least five circuits would have held respondents' conduct actionable under a First Amendment Section 1983 claim in 1995, when respondents' retaliatory actions occurred, see, *e.g.*, *Tao* v. *Freeh*, 27 F.3d 635, 639 (CADC 1994); *Morfin* v. *Albuquerque Public Schools*, 906 F.2d 1434, 1437 (CA10 1990); *Agosto-de-Feliciano* v. *Aponte-Roque*, 889 F.2d 1209, 1218-20 (CA1 1989); *Anderson* v. *Central Point Sch. Dist. No. 6*, 746 F.2d 505, 506-08 (CA9 1984); *Yoggerst* v. *Stewart*, 623 F.2d 35, 39 (CA7 1980), while only one circuit would have held otherwise, see *Pierce* v. *Texas Dep't of Crim. Justice*, 37 F.3d 1146, 1149-50 (CA5 1994), the court of appeals asserted as a matter of law that respondents would in any event be entitled to qualified immunity, Pet. App. 18a. This result was compelled by the Eleventh Circuit's settled rule that "only Supreme Court cases, Eleventh Circuit caselaw, and Georgia [Florida, or Alabama] Supreme Court caselaw can 'clearly establish' law in this circuit." *Thomas ex rel. Thomas* v. *Roberts*, 323 F.3d 950, 955 (2003) (citations omitted)).

By contrast, other circuits reaching the question of whether the law was "clearly established" would have rejected respondents' qualified immunity claims on the basis of (i) this Court's conclusion that retaliation of the sort presented by this case gives rise to a First Amendment retaliation claim (see *supra* at 11-12), and (ii) the great weight of authority in other circuits to the same effect (see *supra* at 13–17). For example, in *El Dia, Inc.* v. *Governor Rossello*, the First Circuit determined that the government's withdrawal of advertising from a newspaper because of the paper's critical articles was "clearly established" as retaliatory conduct. 165 F.3d 106, 110 (1999). The court explained that "the location and level of the precedent, its date, its persuasive force, and its level of factual similarity to the facts before this Court may all be pertinent to whether a particular

precedent 'clearly establishes' law for the purposes of a qualified immunity analysis." *Id.* at 110 n.3. Similarly, the Tenth Circuit rejected a qualified immunity claim in *Dill* v. *City of Edmond*, holding that "the law in other circuits was clearly established" that a transfer and change in work schedule could constitute actionable retaliation. See 155 F.3d 1193, 1205 (1998). The Sixth Circuit adopted the same approach in determining whether particular speech was covered by the First Amendment. See *Bonnell* v. *Lorenzo*, 241 F.3d 800, 824 (2001). It found that "[n]o decisions from the Supreme Court, our circuit, or *any other court*, clearly establish that Plaintiff's speech in the instant case was constitutionally protected * * *." *Ibid.* (emphasis added).

More generally, the Eleventh Circuit's refusal to consider out-of-circuit precedent in determining whether a law is "clearly established" is out of step with the practices of other circuits[12] and this Court's decisions, which provide that *all* relevant precedent should shape the qualified immunity determination.[13]

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[12] See, *e.g.*, *Boyd* v. *Benton County*, 374 F.3d 773, 781 (CA9 2004) ("[I]n the absence of binding precedent, we look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes * * *."); *Buckley* v. *Rogerson*, 133 F.3d 1125, 1129 (CA8 1998) (same); *Cleveland-Purdue* v. *Brutsche*, 881 F.2d 427, 431 (CA7 1989) (same); *Peterson* v. *Jensen*, 371 F.3d 1199, 1202 (CA10 2004) ("A right is clearly established * * * if the clearly established weight of authority from other circuits found a constitutional violation from similar actions.") (quotation marks and citation omitted) .

[13] See *Elder* v. *Holloway*, 510 U.S. 510, 516 (1994) (holding in Section 1983 case that "[a] court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own [and other relevant] precedents") (second alteration in original) (internal quotation and citation omitted); see also *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999) (upholding a grant of qualified immunity but indicating that a different result would have been reached had petitioners "identified a consensus of cases

Finally, to the extent that the court of appeals intended to accord respondents qualified immunity because it was not clearly established that petitioners' claim presented a substantial enough injury to give rise to a *justiciable controversy* (see *supra* at 21-22), its conclusion is flatly contrary to this Court's qualified immunity precedent, which considers whether the stated *constitutional right* was clearly determined, as the right asserted here clearly was: numerous decisions of this Court establish the right to be free from retaliation for engaging in protected speech. See, *e.g.*, *Rutan*, 497 U.S. at 76 n.8.

## II. Certiorari Should Be Granted To Resolve The Circuit Conflict Over What Acts Constitute An Adverse Employment Action Under Title VII.

1. Title VII's anti-retaliation provision prohibits an employer from "discriminat[ing] against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." See 42 U.S.C. 2000e-3(a). The panel below held as a matter of law that petitioner could not state a Title VII claim under that court's settled precedent, which deems retaliatory conduct unlawful only if it materially alters the employee's compensation, terms, conditions, or privileges of employment. Pet. App. 10a. Moreover, the court held that retaliatory conduct is in any event lawful so long as the employer takes corrective measures to mitigate the retaliation's adverse effects on the employee. *Ibid.* These rulings conflict with the precedent of other courts of appeals and merit this Court's review.

Although the circuits agree that "actions such as hiring, discharge, compensation [and other major employment

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of persuasive authority such that a reasonable officer could not have believed that his actions were lawful").

decisions] constitute adverse actions," they "disagree about whether less egregious employment actions (i.e., poor performance evaluations, lateral transfers, intermediate acts of discipline and harassment) constitute adverse actions" under Title VII's retaliation prohibition. Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 321 (2002).

The Eleventh Circuit's standard is particularly strict: retaliation amounts to an actionable adverse employment action only if it is either "an ultimate employment decision," Pet. App. 15a, or "objectively serious and tangible enough to alter [the employee's] compensation, terms, conditions, or privileges of employment," *Gupta* v. *Fla. Bd. of Regents*, 212 F.3d 571, 588 (2000) (citation and internal quotation marks omitted). Under this standard, the Eleventh Circuit rejected two bases of retaliation that other circuits would have deemed actionable.

First, in response to her decision to speak out about gender discrimination in the department's hiring process, petitioner was subjected to a negative job evaluation. Pet. C.A. Br. 17-19. Several other circuits have stated that such "unwarranted negative job evaluations" can qualify as an adverse employment action. *Wyatt* v. *City of Boston*, 35 F.3d 13, 16 (CA1 1994); see also *Yartzoff* v. *Thomas*, 809 F.2d 1371, 1376 (CA9 1987); *O'Brien* v. *City of Philadelphia*, No. 04-CV-1567, 2004 U.S. Dist. LEXIS 21222, at *8 (E.D. Pa. Oct. 19, 2004) (allegations that include negative performance evaluation sufficient to survive motion to dismiss).

Second, petitioner suffered an adverse employment action when respondent Board voted in 1996 against renewing her contract, thereby constructively dismissing her. Pet. App. C.A. Br. 26. Though the vote was eventually overturned – following an appeals process which determined that petitioner had been wrongfully terminated based on her

gender and because she had spoken out against gender discrimination that she had observed – petitioner was forced to expend "tens of thousands of dollars" to plead her case and was, for a period *longer than a year*, subjected to the constant fear that she had lost her job. *Id.* 3, 29-30. In the Eleventh Circuit, however, an employer's actions must have irreversible and final adverse consequences; subsequent corrective action shields the employer from liability. Pet. App. 10a-11a; *Gupta*, 212 F.3d at 588. Petitioner's reinstatement thus transformed her constructive termination into an action "not objectively serious and tangible enough to be [an] adverse employment action[]." Pet. App. 11a.

The Eleventh Circuit's rule directly conflicts with the Ninth Circuit's settled construction of Title VII's anti-retaliation provision. For nearly fifteen years, the Ninth Circuit has applied the same rule under Title VII that it does in Section 1983 cases: retaliatory conduct is an actionable adverse employment action if it is "reasonably likely to deter employees from engaging in protected activity." *Ray* v. *Henderson*, 217 F.3d 1234, 1243 (CA9 2000). Because the probability of adverse consequences can deter protected activity, an employee need not trace an adverse employment action to an actual harm; the potential or threat of such harm suffices to establish an employer's liability. Thus, in *Hashimoto* v. *Dalton*, 118 F.3d 671, 676 (CA9 1997), the plaintiff received a negative job reference from the defendant in retaliation for her employment discrimination complaints. And the Ninth Circuit deemed it irrelevant that the plaintiff would not have been hired, reasoning that the fact that the unlawful action "turned out to be inconsequential goes to the issue of damages, not liability." *Id.* at 676.

And in contrast with the Eleventh Circuit, the Ninth Circuit has determined that an adverse employment action is not expunged if an aggrieved employee is only threatened with, or subsequently obtains a reversal of, the retaliatory decision. The retaliation or threatened retaliation itself constitutes a cognizable adverse employment action. See, *e.g.*,

*Hashimoto*, 118 F.3d at 676 (negative job reference qualified as adverse employment action even when it "turned out to be inconsequential"); *Dimitrov* v. *Seattle Times Co.*, No. 98-36156, 2000 U.S. App. LEXIS 22402, at *9 (CA9 Aug. 29, 2000) (employer liable even though retaliation reversed on appeal); *Moore* v. *Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 848 (CA9 2002) (even a *threatened* act of retaliation action can constitute adverse employment action).

2. This conflict is untenable. Uniformity is essential on this issue because it deals with the anti-retaliation scheme, which is a central feature of Title VII, one of the nation's most important anti-discrimination laws. The anti-retaliation provisions of the statute should not be treated differently in different parts of the country. All employees are entitled to the same level of protection from retaliatory threats and harm. It is an intolerable state of affairs when Floridians enjoy fewer federal anti-discrimination protections than Oregonians, yet this circuit conflict creates precisely this result.

The question is moreover of great importance because Title VII retaliation claims are frequently litigated. Title VII applies not only to almost all "employers" in an "industry affecting commerce," 42 U.S.C. 2000e(b), but also to local, state, and federal government entities, *id.* § 2000e(a). According to the EEOC, over 20,000 Title VII retaliation claims were filed in fiscal year 2003. EEOC, "Charge Statistics FY 1992 Through FY 2003," *at* http://www.eeoc.gov/stats/charges.html. Indeed, claim filings have *increased* by more than 96% since 1992. *Id.*

3. The Eleventh Circuit's extremely limited conception of the acts that amount to adverse employment actions under Title VII is also wrong on the merits. Its rule is directly contrary to the text of the anti-retaliation provision, which prohibits an employer from "discriminat[ing] against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or

hearing under this subchapter." 42 U.S.C. 2000e-3(a). The term "discriminate[]" merely means "differential treatment." BLACK'S LAW DICTIONARY 500 (8th ed. 2004).

Title VII's anti-retaliation provision covers a broader range of employer conduct than its anti-discrimination provision. The latter provision protects an individual from discrimination only "*with respect to his compensation, terms, conditions, or privileges of employment*," based on race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a)(1) (emphasis added). This Court has held that, for purposes of this anti-discrimination provision, only extreme conduct will amount to a change in the terms and conditions of employment. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998). Yet the Eleventh Circuit has imported this requirement into Title VII's anti-retaliation provision, which contains no such limiting language. See, *e.g.*, *Davis* v. *Town of Lake Park*, 245 F.3d 1232, 1238 (CA11 2001) ("The adverse action requirement is not unique to Title VII's anti-discrimination clause. It has been imposed in cases under Title VII's retaliation clause, even though that provision is not limited to unlawful conduct with respect to the 'terms, conditions, or privileges of employment.'").

The Eleventh Circuit's high standard for "adverse employment action" is moreover contrary to Title VII's remedial purpose. "Maintaining unfettered access to statutory remedial mechanisms" is "a primary purpose of antiretaliation provisions * * *." *Robinson* v. *Shell Oil*, 519 U.S. 337, 346 (1997). "[I]t would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII." *Id.* And a broad construction of the anti-retaliation provision is particularly important insofar as one of its purposes is to protect employees – such as petitioner – who complain about discrimination against others; the forms of mistreatment that might deter this salutary whistleblowing may be quite broad indeed, given that the complaining individual often has no stake in the employer's discriminatory behavior. However,

by permitting retaliation as long as it does not "alter the employee's compensation, terms, conditions, or privileges of employment," Pet. App. 10a, the Eleventh Circuit's rule invites precisely that impunity.

Finally, the Eleventh Circuit's decision is directly contrary to the Compliance Manual issued by the EEOC, which administers Title VII.[14] The Manual indicates that "[t]he anti-retaliation provisions are exceptionally broad," and "set no qualifiers on the term 'to discriminate,' and therefore prohibit *any* discrimination that is reasonably likely to deter protected activity. They do not restrict the actions that can be challenged to those that affect the terms and conditions of employment." *U.S. Equal Employment Opportunity Comm'n Compliance Manual*, § 8, at 14 (May 1998), *at* http://www.eeoc.gov/policy/docs/retal.pdf.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[14] This Court has repeatedly referred to the Manual when interpreting Title VII. Relying on the Manual, *Robinson* gave weight to the EEOC's conclusion that allowing retaliation against former employees would "deter victims of discrimination from complaining to the EEOC." 519 U.S. at 345-46 (holding that Title VII's anti-retaliation provisions also extend to former employees). See also *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57, 65 (1986) (guidelines are "not controlling" but "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (internal quotations omitted).

Respectfully submitted,

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February 11, 2005

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[15] Counsel for petitioner were principally assisted by the following students in the Harvard Law School Supreme Court Litigation class: Jeffrey M. Harris, Christopher Houpt, Anton Metlitsky, Sharmila Sohoni, and Alixandra Smith. Class members Mark Conrad, Elissa Hart, Gregory Reilly, Won Shin, and Neel Sukhatme also participated.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-16486

CAROL STAVROPOULOS,
PLAINTIFF-APPELLANT,
v.
EVAN FIRESTONE, W. ROBERT NIX, ET AL.,
DEFENDANTS-APPELLEES.

Argued and Submitted:
Opinion Filed: February 25, 2004

Appeal from the United States District Court for the Middle District of Georgia; Duross Fitzpatrick, District Judge, Presiding. D.C. Docket No. 97-00095 CV-DF-3.

Before EDMONDSON, Chief Judge, DUBINA and COX, Circuit Judges.

## OPINION

COX, Circuit Judge.

## I. INTRODUCTION

Plaintiff, Carol Stavropoulos, appeals the district court's entry of summary judgment for the Defendant Board of Regents of the University System of Georgia ("Board") on her claim that the Board violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). She also appeals the summary judgment for Defendants Evan Firestone and William Squires on her 42 U.S.C. § 1983 First Amendment retaliation claim. We affirm.

## II. BACKGROUND & PROCEDURAL HISTORY

In 1993 the University of Georgia hired Stavropoulos as an assistant professor in the School of Art for the Art Education Program. In 1993 and 1994 she received excellent job performance ratings.

As an untenured assistant professor, Stavropoulos was employed pursuant to a one-year contract. The senior faculty of the School of Art votes each year on whether to renew the contracts of its untenured assistant professors. This vote, however, is not necessarily binding. The dean and assistant dean of the School of Art have the power to override the faculty vote. And, an assistant professor has the right to appeal a vote of non-renewal by filing a grievance with the University's faculty senate, which also can override the non-renewal vote.

During the fall semester of 1994, Defendant Firestone, Director of the School of Art, selected Stavropoulos and five other professors to screen applicants and to recommend a candidate to fill a computer artist position. After reviewing the applications for the job, Plaintiff and another committee member, Dr. Bradley Tindall, believed that a female candidate, Dr. Ann Marie LeBlanc, was the best qualified. The majority of the committee, however, favored hiring Dr. David Kaufman, who was already employed in the School of Art. Because Stavropoulos believed that the majority had begun the process intending to hire Dr. Kaufman, she felt that they were treating Dr. LeBlanc's application unfairly. She voiced her concerns about this perceived unfairness, and, on one occasion, did so by yelling and shaking her fist at her fellow committee members. The committee ultimately voted, four-two, to recommend Dr. Kaufman for the job, with Stavropoulos and Dr. Tindall casting the dissenting votes.

In March 1995 the committee presented its recommendation to the faculty of the School of Art. Dr. Tindall presented his and Stavropoulos's view that Dr. LeBlanc was the most qualified candidate. The faculty voted

to hire Dr. Kaufman. Afterwards, Dr. Tindall and Stavropoulos told Director Firestone that they were going to file a minority report with the Dean of the School of Art. The report, which they filed immediately, detailed Dr. LeBlanc's qualifications, and asserted that as most of the faculty members in the computer field were men, hiring Dr. LeBlanc, a woman, would promote diversity and encourage minorities.

In response to the report, Director Firestone sent a memorandum to Stavropoulos and Dr. Tindall. In the memo, Director Firestone expressed his disapproval of the report, as the committee acted only as an advisory body. Firestone sent copies of the memo to the dean and the assistant dean of the art school.

Shortly after the faculty vote and the minority report, Dr. LeBlanc sent a letter to the University's Legal Affairs Department, stating that she may have been the victim of gender discrimination in the selection of the computer artist. Stavropoulos assisted Dr. LeBlanc by asking a faculty member in the University's Womens' Studies Department to help with Dr. LeBlanc's complaint. Director Firestone learned that Stavropoulos had provided this assistance.

Stavropoulos again received excellent performance evaluations in 1995. In June 1995, however, the faculty voted not to renew Stavropoulos's contract. Several of the faculty members who voted for non-renewal stated that they voted this way because Stavropoulos was not collegial but was insulting and hostile to her fellow faculty members. When Stavropoulos learned of the vote, she complained to the dean of the School of Art about the vote. In response to Stavropoulos's complaints, the associate dean met with Director Firestone. The associate dean asked Director Firestone for documentation of Stavropoulos's uncollegial behavior. To provide this documentation, Director Firestone solicited and compiled letters written by faculty members discussing Stavropoulos's behavior and job performance. Firestone provided this file of letters to the dean and associate

dean. After reviewing the file and the records of the faculty's non-renewal proceedings, the deans decided to reject the faculty vote as unsupported by Stavropoulos's performance ratings. Thus, Stavropoulos was given an employment contract for the 1995-96 academic year. At no time during this process had the University terminated Stavropoulos or otherwise informed her that her contract had not been renewed.

In March 1996 Stavropoulos for the first time received a negative performance evaluation. Around this time, Stavropoulos was due for a third-year review, an evaluation conducted at the end of every tenure-track teacher's third year which examines how that teacher is progressing towards being awarded tenure.[1] Director Firestone chose the four review committee members; he chose three of the four members of the review committee from outside the Art Education Program to avoid any appearance of bias against Stavropoulos. Defendant Squires was chosen as the chairman of the committee.

When the third-year review committee convened in April 1996, Director Firestone charged them with their duties; he opened the charge with "welcome to the committee from hell." (R.3-132 at Ex. F at 199.) He also charged them to review everything regarding Stavropoulos's teaching, research, and service. Though this initially included the file of letters compiled by Firestone, the dean's office clarified that

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[1] Around this time, Stavropoulos sought a promotion and early tenure. On the faculty's recommendation, the University denied these requests. In her complaint, and in defending against the Defendants' motions for summary judgment, Stavropoulos alleged that these denials constituted illegal retaliation. The district court concluded that while these denials were adverse employment actions, the Defendants had proffered legitimate, nondiscriminatory reasons for the denials, which Stavropoulos had failed to show to be pretextual. Stavropoulos does not challenge this conclusion on appeal.

the committee could not consider those letters. The dean's office also made clear that Stavropoulos would be given the opportunity to respond to her review.

Chairman Squires gave the faculty the opportunity to be interviewed by the committee, and gave Stavropoulos the opportunity to give the committee information on her job performance. Stavropoulos alleges that Firestone encouraged faculty members to relate to the committee their negative experiences with Stavropoulos. Firestone submitted to the committee a memo recounting his version of the facts of Stavropoulos's involvement with Dr. LeBlanc's discrimination claim.

Chairman Squires prepared a memorandum entitled "Understanding the Role Played by Illness Relative to Carol Stavropoulos's Performance of Her Duties as a Faculty Member," (R.3-132 at Ex. W) in which Squires opined that Stavropoulos suffered from a mental illness which affected her ability to work with other faculty members. When the committee interviewed Stavropoulos, some members of the committee asked her about her mental health and about certain mental-health prescription drugs she may have taken. Stavropoulos told the committee that she did not suffer from a mental illness; when she made this assertion, Chairman Squires became visibly angry. The third-year review committee's report, published to the faculty on May 27, 1996, stated: "Although it has been mentioned to the committee as an exacerbating factor in her working relationships with others, Dr. Stavropoulos denies that illness has ever in any way compromised her performance as a faculty member." (R.3-132 at Ex. X at 6.)

In June 1996 the faculty met to consider whether to renew Stavropoulos's employment contract for another year. The third-year review committee presented its report. The report discussed Stavropoulos's public anger and hostility toward other faculty members; Stavropoulos's giving "A's" to all of her students in one full calendar year, which called

into question the reliability of her positive student course evaluations; Stavropoulos's resistance to learning and following procedures, both of which resulted in inaccurate guidance and advice to students; and Stavropoulos's holding classes in her home rather than on campus. The report concluded: "The committee agreed that Dr. Stavropoulos is making good progress toward achieving promotion and tenure in the area of research. However, persistent and ongoing problems in the areas of teaching and service are jeopardizing Dr. Stavropoulos' progress towards promotion and tenure." (Id.) Chairman Squires then read a response to the third-year review report, prepared by Stavropoulos.

Later in the meeting, Squires explained to the faculty that he and Director Firestone had talked to the deans about the vote, and that the deans had said that they would not interfere with the faculty's decision this time. Squires explained that he thought that much of Stavropoulos's conduct could be attributed to a mental illness that he said she had told him privately that she suffered from. He then read a portion of his mental illness memo. At the close of the meeting, the faculty voted not to renew Stavropoulos's contract.

After Director Firestone informed Stavropoulos that the faculty had voted not to renew her contract, Stavropoulos filed a grievance with the faculty senate. The faculty senate's grievance panel held a hearing beginning on June 9, 1997. Stavropoulos was represented by an attorney in the grievance proceeding, and bore the cost of this representation. After hearing the grievance, the panel issued a report on June 23, 1997. The report concluded that the art school faculty had improperly voted not to renew Stavropoulos because of her sex, because they perceived her as having a disability, and in retaliation for her conduct in connection with the 1995 selection of the computer artist. As a result, Stavropoulos retained her job with no loss of pay or benefits. She was not, however, reimbursed for the cost of her attorney.

Plaintiff filed this action for damages and injunctive relief, alleging violations of the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, and the Americans with Disabilities Act, against all Defendants.[2] Defendants Firestone and Squires moved to dismiss all claims against them, and the district court granted in part and denied in part this motion.[3] The court allowed Stavropoulos to proceed with her § 1983 First Amendment claim of retaliation brought against these Defendants in their individual capacities,[4] reasoning that, under the facts as alleged in the complaint, these Defendants were not entitled to qualified immunity. These Defendants appealed the qualified immunity ruling, and we affirmed in part, reversed in part, and remanded, concluding that Stavropoulos could proceed on her First Amendment retaliation claim to the extent that she alleged that these Defendants, in their individual capacities, retaliated against her for assisting Dr. LeBlanc in pursuing a claim of gender discrimination. *Stavropoulos v. Firestone*, 178 F.3d 1303, unpublished at 2-3 (11th Cir. 1999). After discovery, all Defendants moved for summary judgment. The district court granted the motions, and entered summary judgment for the Defendants. Stavropoulos appeals.

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[2] Stavropoulos's complaint also alleged several state law claims against Defendant W. Robert Nix. The district court dismissed these claims on Nix's motion, and Stavropoulos does not question this dismissal on appeal.

[3] Nix also joined this motion.

[4] The court also allowed Stavropoulos's official-capacity Title VII, Title IX, and ADA claims against Firestone, Squires, and Nix to proceed, though it recognized them as redundant to claims against the Board. In its summary judgment order, the district court dismissed these official-capacity statutory actions as redundant. Stavropoulos does not question this dismissal.

## III. CONTENTIONS OF THE PARTIES

Stavropoulos makes two contentions on appeal. First, she argues that the district court erred in entering summary judgment for the Board on her Title VII retaliation claim. Specifically, she argues that the court erred when it concluded that neither the 1995 non-renewal vote, the 1996 negative performance review, the negative third-year review, nor the 1996 non-renewal vote constituted adverse employment actions for purposes of Title VII.

Second, Stavropoulos contends that the district court erred in granting Firestone and Squires summary judgment on her § 1983 First Amendment retaliation claim. The court held that they were shielded from suit, in their individual capacities, on the basis of qualified immunity.[5] Stavropoulos argues that the court incorrectly held that she had failed to establish a First Amendment violation against these Defendants on the grounds that they had not subjected Stavropoulos to an adverse employment action for purposes of First Amendment retaliation.[6]

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[5] Parts of Stavropoulos's appellate briefs seem to press her § 1983 First Amendment retaliation claim against the Board. However, the district court dismissed Stavropoulos's § 1983 claims against the Board, reasoning that because the Board is an arm of the state, it is not subject to being sued under § 1983. Stavropoulos does not contend that this dismissal was in error. Thus, we examine Stavropoulos's arguments concerning her § 1983 claim as against the individual Defendants only.

[6] On appeal, Stavropoulos advances her First Amendment claims against Firestone and Squires on a retaliatory-harassment theory, i.e., that the combination of their trivial acts reached such a critical mass that they created a working environment unreasonably inferior to a normal working environment. But Stavropuolos did not present this theory to the district court when summary judgment motions were pending. Instead, she presented it for the first time in a motion to reconsider the summary judgment, (R.4-158, 159), which the district court denied as untimely (R.4-166). Stavropoulos does not argue that the court abused its

The Defendants maintain that the district court committed no error.

## IV. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment, applying the same familiar standards as the district court. *Hallum v. Provident Life & Acc. Ins. Co.*, 326 F.3d 1374, 1375-76 n.1 (11th Cir. 2003).

## V. DISCUSSION

Both of Stavropoulos's issues on appeal involve the substantiality of actions taken against her: whether these actions were substantial enough to be considered adverse employment actions under Title VII and the First Amendment.

### A. Stavropoulos's Title VII Retaliation Claim against the Board

The district court granted summary judgment on Stavropoulos's Title VII retaliation claim, because it concluded that Stavropoulos failed to make out a prima facie case. To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action. *Bass v. Bd. of County Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1117 (11th Cir. 2001). The court held that Stavropoulos failed to show an adverse employment action.

To be considered an adverse employment action for purposes of Title VII's anti-retaliation provision, the action must either be an ultimate employment decision or else must

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discretion in denying her motion to reconsider. Because Stavropoulos failed to properly present her retaliatory-harassment theory to the district court, we decline to consider it on appeal. *Twiss v. Kury*, 25 F.3d 1551, 1556 (11th Cir. 1994) ("We generally will not consider a legal theory that was not presented to the district court . . .").

"meet some threshold level of substantiality." *Id.* at 1118 (internal quotations omitted). Ultimate employment decisions include decisions such as termination, failure to hire, or demotion. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998). The conduct Stavropoulos complains of was not an ultimate employment action, because she did not lose her job or suffer a lessening of pay, position, or benefits. Thus, we must ask whether it rises to the level of substantiality.

In *Wideman*, 141 F.3d at 1455-56, we concluded that the plaintiff had crossed the threshold of substantiality where she established that her employer had improperly listed her as a no-show on a day she was scheduled to have off, gave her written reprimands which resulted in a one-day suspension, solicited comments on her performance from only those employees with negative things to say about her, failed to schedule her for work, threatened to shoot her in the head, and delayed authorizing medical treatment for an allergic reaction she was having. *Id.* at 1455-56 (holding that the totality of these acts meet the threshold of substantiality, but declining to decide whether anything less than the totality would meet the threshold). In *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571 (11th Cir. 2000), we characterized the threshold as requiring the employment action to be "'objectively serious and tangible enough' to alter [the employee's] 'compensation, terms, conditions, or privileges of employment . . . ,'" and held that scheduling the employee to teach on three different campuses in one term did not meet the threshold because she never actually had to follow this schedule, denying her the opportunity to teach a particular class did not suffice because she chose not to teach at all that term, and delaying the return of the employee's visa application was not serious enough because the university returned it to her in time for her to file it with the Immigration and Naturalization Service. *Id.* at 588 (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3rd Cir. 1997)). Our reason for rejecting these three acts as insubstantial was that "an action which, it turns out, had no

effect on an employee is not an 'adverse' action." *Id.* at 588. Applying this standard in *Bass*, 256 F.3d at 1118, we decided there was an adverse employment action when, comparing the plaintiff to other employees of the same rank, the employer forced plaintiff to perform more menial tasks under less senior personnel; denied the plaintiff opportunities to earn several types of extra pay available to his co-workers; and forced plaintiff to take tests in order to maintain his paramedic pay, while not requiring his co-workers to take the tests. We rejected, however, the employer's ordering plaintiff not to record certain tasks in his work log and ordering him to destroy certain materials he had created as insubstantial because they "in no way punished or affected Bass' employment status." *Id.*

Here, the acts Stavropoulos complains of ultimately had no effect on her employment status. Though agents of the Board rated her negatively and voted to terminate her, other agents of the Board overrode the votes, keeping Stavropoulos in her position, with the same pay and benefits. Thus, these acts were not objectively serious and tangible enough to be adverse employment actions. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001) (noting that Title VII retaliation caselaw "indicates that the decision to reprimand or transfer an employee, if rescinded before the employee suffers a tangible harm, is not an adverse employment action"). *Cf. Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 543-46 (6th Cir. 1999) (affirming summary judgment for university in associate professor's Title VII discrimination case because, on the professor's appeal, the faculty senate reversed the dean's decision to deny her tenure, and awarded tenure retroactively so that she lost no salary; thus there was no adverse employment action). Any emotional distress or costs incidental to Stavropoulos's seeking the review provided in her contract with the Board is likewise too insubstantial to be considered an adverse employment action since the review proved successful for Stavropoulos. *Bass*, 256 F.3d at 1118 ("While not everything

that makes an employee unhappy is an actionable adverse action, conduct that alters an employee's compensation, terms, conditions, or privileges of employment does constitute an adverse action under [the anti-retaliation provisions of] Title VII.") (internal citations and quotations omitted).

Because Stavropoulos failed to show that the Board subjected her to an adverse employment action, she failed to make out a prima facie case of retaliation under Title VII.

**B. Stavropoulos's § 1983 First Amendment Retaliation Claim against Firestone and Squires**

Stavropoulos next argues that the district court erred in holding that Firestone and Squires, in their individual capacities, were protected by qualified immunity from her First Amendment retaliation claims against them.

To determine whether a state officer, acting within his discretion, is entitled to qualified immunity, we employ a two-step, sequential analysis. First, we ask whether the officer's conduct violated a constitutional right, taking the facts in the light most favorable to the party asserting the injury. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). If we find that the officer's conduct violated a constitutional right, we must ask whether the right was clearly established. *Id.* If we find that the conduct did not violate a constitutional right, or that the right was not clearly established, then the officer is shielded from suit by qualified immunity. *Id.*

To state a claim for retaliation in violation of the First Amendment, a public employee must show that her employer retaliated against her because of her speech on a matter of public concern. *McCabe v. Sharrett*, 12 F.3d 1558, 1564 n.3 (11th Cir. 1994). A public employer retaliates when he takes an adverse employment action that is likely to chill the exercise of constitutionally protected speech. *Goffer v. Marbury*, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992). Here, the district court concluded Stavropoulos failed to establish a

violation, as she failed to show that Firestone and Squires subjected her to an adverse employment action. Based on the failure to state a constitutional violation, the court held that Firestone and Squires were shielded by qualified immunity.

The district court based its conclusion that Firestone and Squires had not subjected Stavropoulos to an adverse employment action solely on its Title VII adverse-action analysis: because there was no adverse employment action for Title VII purposes, the court held without further analysis that there was no adverse action for First Amendment purposes. Stavropoulos contends that this was error, because, she argues, the First Amendment imposes a much more liberal standard in determining whether an employment action is adverse. She argues that any action likely to chill the employee's exercise of constitutionally protected speech satisfies the adverse employment action requirement. This standard is contrary to our precedents. While it is true that a claimant must show a chilling effect on her protected speech, she must also show that this effect resulted from an adverse employment action.

To be considered an adverse employment action in a First Amendment retaliation case, the complained-of action must involve an important condition of employment. *Bickel v. Burkhart*, 632 F.2d 1251, 1255 n.6 (5th Cir. Unit A 1980)[7] (concluding that a fire chief's decision not to promote a firefighter in retaliation for the firefighter's negative public comments about the fire department was an adverse employment action, stating: "Where, as here, important conditions of employment are involved, a public employee will not be foreclosed from § 1983 relief merely because the impermissible retaliation did not result in the termination of his employment."). We have defined which acts involve

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[7] Decisions of the Fifth Circuit rendered on or before September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

important conditions of employment by a list of examples. This list includes include discharges, demotions, refusals to hire or promote, and reprimands. *See Goffer*, 956 F.2d at 1049 n.1 (listing examples of adverse employment actions: "refusal to hire, demotion, reprimand, refusal to promote"). *See also McCabe*, 12 F.3d at 1563 ("'Adverse employment action' is broadly defined and as a matter of law includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands"; citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79, 110 S. Ct. 2729, 2739, 111 L. Ed. 2d 52 (1990),[8] where the Court held that a public employer could not award or deny promotions, transfers, recalls, and hires on the basis of political party affiliation without running afoul of the First Amendment).

While we have not explicitly equated this element with Title VII's adverse employment action requirement, we regularly draw cases applying this rule to inform our analysis of Title VII retaliation claims. *See, e.g., Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1238 (11th Cir. 2001) (quoting the adverse employment action passage in *McCabe*, a First Amendment retaliation case, in analyzing whether an

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[8] In *Rutan*, the Supreme Court noted with approval a Seventh Circuit case which held that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee [could be actionable] when intended to punish her for exercising her free speech rights." *Rutan*, 497 U.S. at 75 n.8, 110 S. Ct. at 2737-38 n.8 (citation omitted). Because this was not the Court's holding, and was not necessary to the Court's holding, it is dicta. And since it is dicta, we decline to break with our precedents to follow it. *See Pierce v. Tex. Dep't of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1149-50 n.1 (5th Cir. 1994) (noting that this language is dicta, that the holding of *Rutan* is consistent with *Bickel*'s requirement that to be an adverse employment action, the action must affect an important condition of employment, and therefore refusing to follow the *Rutan* dicta; but noting that in *Tao v. Freeh*, 307 U.S. App. D.C. 185, 27 F.3d 635, 639 (D.C. Cir. 1994), the D.C. Circuit applied the dicta as the rule in First Amendment retaliation cases).

employment action was adverse for Title VII purposes); *Wu v. Thomas*, 996 F.2d 271, 273 (11th Cir. 1993) (citing *Bickel* in its analysis of whether the plaintiffs had been subjected to an adverse employment action under Title VII). This is because the standards are consonant. Compare *Bass*, 256 F.3d at 1118 (requiring an action to be "an ultimate employment decision" or to "meet some threshold level of substantiality", and stating that "conduct that alters an employee's compensation, terms, conditions, or privileges of employment does constitute an adverse action under Title VII") with *Bickel*, 632 F.2d at 1255 n.6 (requiring "important conditions of employment" to be involved to be an adverse employment action under the First Amendment).

Requiring the First Amendment retaliation claimant to show that the action she complains of not only was likely to chill her speech but also altered an important condition of employment insures that she satisfies the injury-in-fact requirement of federal justiciability law. To satisfy this justiciability requirement, the claimant "'must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action.'" *Laird v. Tatum*, 408 U.S. 1, 13, 92 S. Ct. 2318, 2325, 33 L. Ed. 2d 154 (1972) (quoting *Ex Parte Levitt*, 302 U.S. 633, 634, 58 S. Ct. 1, 82 L. Ed. 493, (1937)). The Supreme Court has held that, in the First Amendment context, "allegations of a subjective 'chill' are not an adequate substitute for a claim of a specific present objective harm or a threat of specific future harm." *Laird*, 408 U.S. at 13-14, 92 S. Ct. at 2325-26. Thus, to satisfy principles of justiciability, an employee complaining of First Amendment retaliation must show more than her subjective belief that the employer's action was likely to chill her speech: she must show that the action had an impact on an important aspect of her employment. This too is consonant with Title VII. *See, e.g.*, *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995) (affirming judgment as a matter of law for county on employee's Title VII and 42 U.S.C. § 1981 claims, stating: "Where an employer has taken prompt and

effective corrective measures to redress alleged incidents of racial harassment, the employer is not liable because its final act was not of a discriminatory nature. It is the complainant's consequent lack of injury-in-fact . . . that bars judicial redress.").

Thus, we conclude that the district court committed no error by applying Title VII standards of what is an adverse employment action to Stavropoulos's First Amendment retaliation claim. Applying this standard to Stavropoulos's claims against Firestone, and Squires, we conclude that the district court committed no error inconcluding that neither of these Defendants inflicted an adverse employment action upon Stavropoulos.[9]

Stavropoulos asserts that Firestone's adverse employment actions were his sending her a memo criticizing her for filing a report with the dean's office on Dr. LeBlanc's candidacy for the computer artist position, creating the file of letters, and encouraging faculty members with negative things to say about Stavropoulos to interview with the third-year review committee. Though these are not actions appearing on the *McCabe* list of adverse employment actions, we have never held that the list cannot be expanded, so long as the action impacts an important condition of employment.[10] *Cf.*

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[9] Because the district court simply relied on its analysis of whether there was an adverse employment action for purposes of Stavropoulos's Title VII claim against the Board, it did not separate Firestone and Squires's actions in determining whether either of them had taken an adverse action against her. We must do this, however, because Stavropoulos sues these Defendants individually under § 1983, and does not allege that they conspired together to retaliate against her in violation of the First Amendment. Likewise, we do not consider conduct which we considered with relation to the Board, but which cannot be attributed to Firestone or Squires.

[10] *But see Rogers v. Miller*, 57 F.3d 986, 992 (11th Cir. 1995) (concluding that defendants, accused of threatening employees in

*Breaux v. City of Garland*, 205 F.3d 150, 157-59 (5th Cir. 2000) (noting that the Fifth Circuit has declined to expand the list beyond discharges, demotions, refusals to hire or promote, reprimands, and punitive transfers to avoid enmeshing federal courts in trivial employment matters, noting that "some benefit must be denied or some negative consequence must impinge on the Plaintiff's employment before a threat of discharge is actionable," citing *Bickel*, 632 F.2d at 1255 n.6). Taken together or separately, Firestone's acts fail to rise to the level of an adverse employment action because they had no impact on an important condition of Stavropoulos's job, such as her salary, title, position, or job duties. *Cf. Pierce v. Tex. Dept. of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1150 (5th Cir. 1994) (holding that threatening an employee to mind her own business, investigating her, videotaping her without her permission, and forcing her to take a polygraph, all in retaliation for employee's speech, were not adverse employment actions because they had no effect on the conditions of her employment, even though they may have had the effect of chilling her speech).

As to Squires, Stavropoulos points to his preparing and reading to the faculty the mental illness memo as an adverse action. Like Stavropoulos's allegations regarding Firestone, this is not substantial enough to be actionable because it had no effect on an important condition of Stavropoulos's employment. *Cf. Breaux*, 205 F.3d at 158-59 (holding that, among other things, requiring an employee to undergo a psychological evaluation following the employee's intemperate remarks to a coworker was not an adverse employment action, where it had no effect on an important condition of his employment).

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retaliation for the employees' political statements, were shielded by qualified immunity from First Amendment retaliation claims, as "no caselaw existing at the time of these events clearly established that such conduct, under the circumstances, constituted 'adverse employment action' prohibited under the First Amendment").

The district court correctly held that Stavropoulos failed to show an adverse employment action, and therefore failed to establish a constitutional violation by either Firestone or Squires. And, even if we had found that Firestone or Squires's actions amounted to a violation of Stavropoulos's First Amendment rights, our discussion of the caselaw in this area shows that there was no clearly established law to put them on notice that their actions were a violation. Thus, the district court properly held that Firestone and Squires were shielded by qualified immunity.

## VI. CONCLUSION

Because Stavropoulos failed to establish a prima facie case of retaliation under Title VII against the Board, and because Firestone and Squires are entitled to qualified immunity from her First Amendment retaliation claims, the district court properly entered summary judgment for the Defendants.[11]

AFFIRMED.

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[11] Stavropoulos also appeals the district court's granting Defendant Nix summary judgment on Stavropoulos's First Amendment retaliation claim. But, on appeal, she attributes to Nix none of the actions she contends were retaliatory. Thus, we affirm the district court's judgment as to Nix without further discussion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CAROL STAVROPOULOS,
PLAINTIFF-APPELLANT,
*v.*
EVAN FIRESTONE, W. ROBERT NIX, WILLIAM SQUIRES,
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
DEFENDANTS-APPELLANTS.

3:97-CV-95 (F)

Opinion Filed Mar. 12, 2002

Before DUROSS FITZPATRICK, District Judge

ORDER

Before the Court are motions for summary judgment filed by Defendant Board, Defendant Firestone, Defendant Nix, and Defendant Squires. Plaintiff has filed suit against Defendants under 42 U.S.C.A. § 1983 for violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, and the Americans with Disabilities Act.

## I. FACTUAL BACKGROUND

Plaintiff obtained employment with the University of Georgia in 1993 as a professor in the School of Art within the Art Education program. At all times relevant to this action, Defendant Firestone was the Director of the School of Art and Defendant Nix was the Chairman of the Art Education

program. Additionally, Dr. John Morrow served as Associate Dean of the School of Art until succeeded by Dr. Hugh Ruppersburg in 1996. Dr. Wyatt Anderson was Dean of the School of Art.

During the fall semester of 1994, Defendant Firestone selected Plaintiff and five others to serve on a search committee that was charged with finding a suitable candidate for the computer artist position. During the next few months, the committee met and reviewed applicants. Plaintiff contends that from the beginning, the majority of the committee had already made a decision that Dr. David Kaufman, a male candidate, should be hired. However, Plaintiff and another committee member, Dr. Bradley Tindall, both felt that Dr. Ann Marie LeBlanc, a female, was a better qualified candidate than Dr. Kaufman. Throughout the process, Plaintiff challenged the majority's support for Dr. Kaufman, and she contends that she voiced concerns that Dr. LeBlanc was not being given fair treatment. Defendants respond that Plaintiff voiced these concerns to the committee inappropriately by yelling and becoming violent. Despite the concerns of Plaintiff and Dr. Tindall, the committee ultimately selected Dr. Kaufman by a vote of four to two; Plaintiff and Dr. Tindall dissented.

On March 22, 1995, the committee presented its recommendation to a meeting of the full faculty of the art department. Plaintiff and Dr. Tindall also presented their minority view. The majority of the faculty voted in favor of hiring Dr. Kaufman. After this decision, on March 25, 1995, Plaintiff and Dr. Tindall informed Defendant Firestone of their intent to file a minority report to Dean Anderson. They immediately filed the report. In addition to addressing the qualifications of Dr. LeBlanc, the report stated:

> A final concern is the proactive recruitment policy currently in place within the University. In the computer field generally, men comprise the vast majority of

> teaching and other professional positions. We feel that our support of a candidate like Ann Marie LeBlanc will not only help diversify the field, but may serve as an example for women and other underrepresented groups.

Despite both the report and concerns of Plaintiff and Dr. Tindall, the administration deferred to the art department's decision in deciding to hire Dr. Kaufman. Additionally, in response to the concerns voiced by Plaintiff and Dr. Tindall, Defendant Firestone sent a memorandum to both Plaintiff and Dr. Tindall expressing disapproval with their intentions to press their minority position so far because the committee acted only as an advisory body. Copies of the memorandum were also sent to Dean Anderson and Assistant Dean Morrow.

In April 1995, Dr. LeBlanc sent a letter to the University's Legal Affairs Department expressing concerns that she had been discriminated against on the basis of gender during the selection process for the computer artist position. Around that time, Plaintiff took affirmative steps to support Dr. LeBlanc's contentions of discrimination. For example, Plaintiff contacted Pat DelRey, a faculty member in the Women's Studies Department, to intercede on behalf of Dr. LeBlanc and assist in the complaint of discrimination. Plaintiff raised this issue soon after the committee's recommendation to hire Dr. Kaufman. Defendant Firestone admits that he learned of Plaintiff's involvement in making allegations of gender discrimination only a few weeks after the faculty vote.

In the spring of 1995, the majority of senior faculty of the School of Art voted not to renew Plaintiff's employment contract for the 1996-1997 academic year. Defendants contend that the faculty made this decision because Plaintiff did not appear to behave professionally or congenially toward other professors. They then cited several such

examples of Plaintiff's conduct that supported that conclusion, including her questioning the honesty of her department colleagues and her reference to others in the department as being "800- or 900-lb. gorillas." Defendants also contend that the School of Art never notified Plaintiff of this recommendation of non-renewal. Nevertheless, Plaintiff did learn of the non-renewal vote, and she subsequently complained to the Dean's office about this vote. At the request of Dr. Morrow, and in response to this complaint, Defendant Firestone began to maintain a "separate personnel file," which was given to Associate Dean Morrow. To create this file, Defendant Firestone requested letters and evaluations from other faculty members concerning Plaintiff's behavior and job performance. However, upon reviewing both this file and the records of the committee's non-renewal decision, Associate Dean Morrow and Dean Anderson decided not to support the non-renewal vote; instead, they offered Plaintiff a new employment contract for the 1996-1997 academic year. Associate Dean Morrow stated that he decided to reject the committee's recommendation because it was too difficult to reconcile Plaintiff's excellent performance evaluations and the vote to terminate.

During the 1995-96 academic year, Plaintiff made a request to be considered for early tenure and promotion. However, in February 1996, the tenured faculty voted to deny this request. The next month, Plaintiff requested a special review committee on the matter, but the tenured faculty voted against the appointment of such a committee. In support of this decision, Defendants have referred to the University's policy that all faculty must undergo a five-year probationary period before receiving promotion or tenure. At the time of Plaintiff's early request, she was still in her third year as a professor at the University - still within the minimum probationary period. In addition to this policy, Defendants note that there were concerns that Plaintiff was not yet ready

for promotion or tenure due to the lacking strength of her publications.

Toward the end of that same year, Plaintiff was also to undergo her third-year review, a process used by the faculty to assess a professor's progress toward attaining tenure. On May 1, 1996, Associate Dean Ruppersburg voiced concerns about bias in Plaintiff's upcoming review due to recent events, but he stated that Plaintiff's "separate personnel file" would not be used and that Plaintiff would have the opportunity to respond to the committee's report. Additionally, to mitigate any bias in the process, three of the four review committee members came from outside the Art Education program. Defendant Firestone submitted a fact memorandum discussing events concerning Dr. LeBlanc and Plaintiff's involvement with claims of discrimination. Defendant Firestone also allegedly solicited faculty members to speak to the committee about negative experiences with Plaintiff. During the review, some members asked Plaintiff questions about her mental health and related medications that she may have taken. Defendant Squires prepared a memorandum discussing matters related to these concerns that Plaintiff suffered from such a mental illness. Plaintiff now contends that the committee wrongfully perceived her as having a mental illness.

Defendants have cited several instances in support of these perceptions and concerns that Plaintiff was, in fact, suffering from a mental illness. They contend that over the years, she has been treated with Zoloft, Diazepam, Wellbutrin, and Prozac. They also contend that she has suffered from anxiety and depression, which originated from marital problems. Additionally, during the spring quarter of 1997, Plaintiff took medical leave because she suffered from migraine headaches, and she then became addicted to narcotics.

On May 27, 1996, the third-year review committee presented its report to the tenured faculty who were meeting

to vote on the renewal of Plaintiff's 1997-1998 employment contract. Plaintiff was allowed to present her responses to the report. The report discussed Plaintiff's public hostility toward others as creating a difficult work environment. It also discussed concerns about Plaintiff giving all "A's" to a large number of students as being the source of good teaching evaluations. During the course of the meeting, Defendant Squires read his memorandum on mental illness. Defendant Squires then expressed reservations about reading Plaintiff's response to the committee report. At the conclusion of these proceedings, the tenured faculty voted not to renew Plaintiff's contract for 1997-1998. In addition to the problems cited in the report, Defendants justify this decision based on Plaintiff's behavior when talking to students, failure to meet with students and canceling classes, and errors in advising students on courses. On June 13, 1996, Defendant Firestone informed Plaintiff of the non-renewal vote.

Plaintiff then filed a grievance with the College of Arts & Sciences Faculty Senate Grievance Panel, which had a hearing beginning on June 9, 1997. Plaintiff was represented by an attorney at these proceedings. On June 23, 1997, the Panel issued a report stating that the decision not to renew Plaintiff's contract had resulted from discrimination against her on the basis of a perceived disability and gender, and retaliation for her conduct regarding the 1995 computer artist position selection. Plaintiff, therefore, retained her position as professor for the 1997-1998 academic year and received no loss of pay or benefits. No disciplinary action was taken against Defendants, and Plaintiff was not reimbursed for her legal costs.[1]

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[1] Subsequent to the original filing of this action, but prior to Plaintiff's amended complaint, Plaintiff was due to be considered for promotion and tenure by the 1997-1998 review committee. The promotion and tenure review panel, which consisted of full

## II. DISCUSSION

### *A. Standard of Review*

Summary judgment must be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A genuine issue of material fact necessary to defeat a properly supported motion for summary judgment arises only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In reviewing a motion for summary judgment, the court must review all the evidence in the record while "draw[ing] all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."

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professors from outside of Plaintiff's department, voted four to three against her promotion and five to two against tenure. Despite the occurrence of this event prior to Plaintiff's filing of her amended complaint, and despite the mention of this event on several occasions in Defendants' briefs, the Court notes that this event is not relevant to the current matter for several reasons.

First, while the complaint does state that she was "subjected to malicious and retaliatory action by defendants in the tenure review process," Plaintiff gives no clear indication that this allegation applies to both the 1996 denial of early review and the 1997-1998 denial of tenure. Second, the complaint provides a factual basis for only the 1996 promotion and tenure decision, and makes no mention whatsoever of the 1997-1998 decision. Third, Plaintiff has mentioned the events surrounding the 1997-1998 decision only in *response* to Defendant's discussion of these matters in their statements of facts. Finally, the fact that Plaintiff has brought a subsequent suit against Defendants for numerous denials of promotion and tenure, one of which was the 1996 decision, provides strong evidence that Plaintiff did not intend to file redundant claims. Accordingly, the matter currently before the Court does not involve claims for the 1997-1998 denial of tenure and promotion.

*Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see also Maynard v, Williams,* 72 F.3d 848, 851 (11th Cir. 1996).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact" and that entitle it to a judgment as a matter of law. *Celotex Corp.,* 477 U.S. at 323 (internal quotation marks omitted). If the moving party discharges this burden, the burden then shifts to the nonmoving party to go beyond the pleadings and present specific evidence showing that there is a genuine issue of material fact (i.e., evidence that would support a jury verdict) or that the moving party is not entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(e); *see also CelotexCorp.,* 477 U.S. at 324-26. This evidence must consist of more than mere conclusory allegations or legal conclusions. *See Avirgan v. Hull,* 932 F.2d 1572, 1577 (11th Cir. 1991). Under this scheme, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

### *B. Title VII Claims*

#### 1. Proper Parties

Plaintiff has brought Title VII claims against Defendants for retaliation and for disparate treatment based on gender. However, the Court finds it necessary to discuss which Defendants are properly sued under this claim. As to Plaintiff's Title VII claims against Defendants Firestone, Nix, and Squires, "individual capacity suits under Title VII are inappropriate," and such suits should be brought only against the employer. *Busby v. City* of *Orlando,* 931 F.2d 764, 772 (11th Cir. 1991) (per curiam). Plaintiff's claims

against Defendants Firestone, Nix, and Squires, in their official capacities, are likewise inappropriate because such claims would be redundant of claims against Defendant Board. *See id.* Accordingly, Plaintiff's Title VII claims are appropriate only against Defendant Board, and the motions for summary judgment by Defendants Firestone, Nix, and Squires regarding Plaintiff's Title VII claims against them in their official and individual capacities are hereby GRANTED. The Court will now turn the merits of these claims for retaliation and discrimination against Defendant Board.

**2. Title VII Retaliation Claims**

Analysis of Title VII retaliation claims is governed by the framework developed in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-03 (1973), and *Texas Department of Community Affairs v. Burdline*, 450 U.S. 248, 253 (1981). *See Goldsmith v. City of Atmore,* 996 F.2d 1155, 1162-63 (11th Cir. 1993). In accordance with this framework, the plaintiff first bears the burden of establishing a prima facie case of retaliation. *See McDonnell Douglas Corp.,* 411 U.S. at 802; *Goldsmith,* 996 F.2d at 1263. If the plaintiff successfully establishes a prima facie case of retaliation, then the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for its conduct. *See Burdine,* 450 U.S. at 253; *Goldsmith,* 996 F.2d at 1263. Upon the defendant's production of a legitimate nondiscriminatory reason, the burden shifts back to the plaintiff to demonstrate, by a preponderance of the evidence, that this proffered explanation is merely pretext and that the defendant's real purpose was discriminatory. *See Burdine,* 450 U.S. at 253; *Goldsmith,* 996 F.2d at 1263.

**a. Prima Facie Case**

Defendant Board first contends that Plaintiff has failed to establish a prima facie case of retaliation. To make out a prima facie case of retaliation, a plaintiff must show that: (1) she engaged in statutorily protected activity, (2) she suffered

an adverse employment action, and (3) the adverse employment action was causally linked to the protected activity. *See Bass v. Bd.* of *County Comm'rs,* 256 F.3d 1095, 1117 (11th Cir. 2001); *Goldsmith,* 996 F.2d at 1163. Defendants contend that: (1) Plaintiff did not engage in any statutorily protected activity, (2) Plaintiff did not suffer from an adverse employment action, and (3) even assuming the satisfaction of the first two prima facie retaliation elements, Plaintiff has shown no causal link between an adverse employment action and any such activity.

**i. Statutorily Protected Activity**

An employee is protected from discrimination under the opposition clause if "he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C.A. § 2000e-3(a) (West 1994). Moreover, to fall within the scope of the opposition clause, it is necessary that the plaintiff have "a good faith, reasonable belief that her employer has engaged in unlawful discrimination." *Clover v. Total Sys. Servs., Inc.,* 176 F.3d 1346, 1351 (11th Cir. 1999) (internal quotation marks omitted). The objective reasonableness of this belief "must be measured against existing substantive law." *Id.* Here, Defendant Board claims that Plaintiff never believed Dr. LeBlanc was subjected to discriminatory animus. Rather, Defendant Board contends that Plaintiff challenged the selection of Dr. Kaufman solely out of the belief that favoring him as an internal candidate was unfair to other candidates, such as Dr. LeBlanc. Therefore, according to Defendant Board, while Plaintiff disagreed with the hiring criteria, she did not actually believe that others on the committee were in violation of Title VII or that they favored Dr. Kaufman because he was male. Plaintiff responds that she did believe that Defendant Board's selection of Dr. Kaufman was discriminatory in violation of Title VII. For the following reasons, the Court finds that Plaintiff has met her burden of demonstrating involvement in statutorily protected activity under the opposition clause.

The record reflects sufficient evidence to support the inference that Plaintiff challenged the computer search results because of her concerns about gender discrimination. Within only a few weeks of the completion of the computer artist search, and prior to any of the allegedly adverse employment actions, Defendant Firestone learned that Plaintiff was complaining about gender discrimination. Plaintiff also helped Dr. LeBlanc to file a discrimination claim concerning the selection process and spoke to other faculty to gather support on this matter. She also, in her deposition, states that she spoke out because of her concern that the conduct was "clearly illegal." Furthermore, the Court finds this subjective belief to have been objectively reasonable. As an initial matter, other individuals have agreed that a reasonable individual could have viewed the decision making process as being discriminatory. Associate Dean Morrow, for example, stated that such a view would seem reasonable based on the fact that Dr. LeBlanc's interview and credentials both were superior to those of Dr. Kaufman. Additionally, case law supports such a belief; for example, it appears that Dr. LeBlanc could have at least made out a prima facie case of discrimination based on the fact that the position appears to have been given to a less-qualified individual who was outside of her protected class. *See, e.g., McDonnell Douglas Corp.,* 411 U.S. at 802; *Rutstein v. Avis Rent-A-Car Sys., Inc.,* 211 F.3d 1228, 1235 n.14 (11th Cir. 2000). Viewing the circumstances as a whole, the Court finds that Plaintiff has established a genuine issue of material fact as to whether she harbored an objectively reasonable belief that Dr. LeBlanc was the victim of gender discrimination.

**ii. Adverse Employment Action**

Defendant Board also contends that Plaintiff has not demonstrated that she suffered from an adverse employment action. Plaintiff responds by noting that she suffered several separate adverse employment actions: (1) the 1995 vote not

to renew Plaintiff's contract for the 1996-1997 academic year, (2) the 1996 denial of early consideration for promotion and tenure, and (3) the 1996 third-year review and vote not to renew Plaintiff's contract for the 1997-1998 academic year. However, Defendant Board argues that neither of the decisions to deny renewal of Plaintiff's contract constituted an adverse employment action for the purpose of establishing a prima facie case of gender discrimination. According to Defendant Board, because each of these initial votes to renew her contract was overturned, and because neither prevented Plaintiff from working in her same position and capacity, neither constituted an adverse employment action. Plaintiff responds that despite the fact that these initial actions did not ultimately affect her position, each caused her to incur substantial legal expenses and to suffer from emotional distress.

In determining whether conduct constitutes an adverse employment action for purposes of Title VII, the Court looks to federal, rather than state, law. *See Hinson,* 231 F.3d at 828-29. The Eleventh Circuit has noted that:

> An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her or employment opportunities, or adversely affects his or her status as an employee. Conduct that falls short of an ultimate employment decision must meet some threshold level of substantiality to be cognizable under the anti-retaliation clause of Title VII. While not everything that makes an employee unhappy is an actionable adverse action, conduct that alters

> an employee's compensation, terms, conditions, or privileges of employment does constitute an adverse action under Title VII.

*Bass,* 256 F.3d at 1118 (citations and internal quotation marks omitted). Therefore, when an employment action results in a reduction of pay, prestige, or responsibility, it is considered adverse. *See Hinson,* 231 F.3d at 829; *Doe v. Oekalb County Sch. Dist.,* 145 F.3d 1441, 1448 (11th Cir. 1998). In contrast to those cases involving ultimate employment decisions affecting an employee's status or benefits, the non-renewal decisions raised by Plaintiff were temporary decisions that never culminated in a final decision and never affected her position or salary. In its examination of such temporary employment decisions, the Eleventh Circuit has recognized "that the decision to reprimand or transfer an employee, if rescinded before the employee suffers a tangible harm, is not an adverse employment action." *Pennington v. City of Huntsville,* 261 F.3d 1262, 1267 (11th Cir. 2001). Only when the employee "loses pay or an employment benefit" due to the delay does temporary conduct constitute an adverse action. *Id.* Generally, such benefits involve the delay of bonuses or increased salary resulting directly from the temporary decision. *See id.* Here, Plaintiff suffered no loss of pay or benefits due to either of the non-renewal decisions; rather, each of these decisions was overturned before it was allowed to have any tangible effect on Plaintiff's employment status, and she retained her same position and pay while the decisions were reconsidered. In the end, the only harms that Plaintiff contends these temporary decisions caused were those of emotional distress and costs arising from related legal actions. These simply do not suffice to

render Defendant Board's temporary decisions adverse employment actions for Title VII purposes.[2]

In contrast, the 1996 denial of Plaintiff's request for early promotion and tenure review constitutes an adverse employment action. This event involved a decision directly related to the status of Plaintiff's salary and employment benefits. Furthermore, even though the 1996 decision was not final in the sense that it did not present a permanent bar to her future chances for promotion or tenure, it effectively resulted in the immediate denial of a potential raise in salary and improvement in benefits. Therefore, unlike the temporary denial of contract renewal that ultimately did nothing to affect Plaintiff's job, the 1996 denial of early review for promotion and tenure created an immediate bar to material benefits to which Plaintiff may have otherwise been entitled. Accordingly, the denial of early review constitutes

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[2] Plaintiff has also complained that these reviews and decisions led to the production of adverse performance reviews. However, the Eleventh Circuit has warned that courts should be "reluctant to treat job performance memoranda as actionable under Title VII where they do not trigger any more tangible form of adverse action such as loss in benefits, ineligibility for promotional opportunities, or more formal discipline." *Davis v. Town of Lake Park,* 245 F.3d 1232, 1241 (11th Cir. 2001); *see also Lucas v. W. W. Grainger, Inc.,* 257 F.3d 1249, 1261 (11th Cir. 2001). Here, the only potential effects that these reviews would have had on her benefits and promotion would have been through committee decisions regarding promotion and tenure. As previously discussed, however, the only such decision of which Plaintiff has complained was the 1996 denial of early promotion and tenure consideration. The performance reviews that occurred in 1996 could not have affected the chances of Plaintiff receiving promotion and tenure until the 1997-1998 decision, when the tenure and promotion probation period had expired and when the University reached an ultimate decision on the mailer. However, as previously noted, Plaintiff has not brought claims in this action concerning that decision.

an adverse employment action for purposes of Title VII; the other conduct simply does not meet the requisite threshold of substantiality.

**iii. Causal Link Between Adverse Employment Action and Protected Activity**

Defendant Board also contends that, even assuming that Plaintiff suffered an adverse employment action and that she spoke out under the protection of the opposition clause, Plaintiff has failed to establish the causal link between such an adverse action and the statutorily protected activity. To establish a causal link of retaliation, it is necessary, at a minimum, for a plaintiff to demonstrate that the "'employer was actually aware of the protected expression at the time it took the adverse employment action,'" *Griffin v. GTE Fla., Inc.,* 182 F.3d 1279, 1284 (11th Cir. 1999) (per curiam) (quoting *Goldsmith,* 996 F.2d at 1163). At the same time, the Eleventh Circuit has recognized that "the causal link element is construed broadly so that 'a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated.'" *Pennington,* 261 F.3d at 1266 (quoting *EEOC v. Reichhold Chem. Inc.,* 988 F.2d 1564, 1571-72 (11th Cir. 1993)).

Here, it appears that Plaintiff has met the minimal burden of demonstrating a causal link between her statutorily protected activity and the denial of her requested consideration for early promotion and tenure. The record provides ample evidence that Plaintiff made Defendant Board aware of her allegations of gender discrimination on a number of occasions. *See Clover,* 176 F.3d at 1354 (noting that an employer's prior knowledge of the protected speech is circumstantial evidence of a causal link). She produced the minority memorandum in response to the committee decision concerning Dr. LeBlanc, and she discussed her concerns about discrimination with Associate Dean Morrow. Even Defendant Firestone admits that he knew that Plaintiff raised

concerns about gender discrimination long before a decision regarding that request was reached. Moreover, while the fact that the early tenure and promotion decision occurred about one year after the protected speech may cut against inferring a causal link, the composition of the decision making body that denied early review overcomes this negative inference. In fact, it is highly likely that a number of those tenured faculty who participated in the denial also participated in the prior 1994-1995 decision not to renew Plaintiff's contract, and, therefore, they would have previously heard about Plaintiff's protected activity. Such prior knowledge may well have biased their decision to deny early review. Accordingly, Plaintiff has established a prima facie case of retaliation regarding only the denial of her request for early promotion and tenure in 1996.

**b. Legitimate Nondiscriminatory Reason**

Because Plaintiff has established a prima facie case of retaliation, the burden of production now shifts to Defendant Board to provide "reasons for its actions, which *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507 (1993); *see also Burdine,* 450 U.S. at 253. However, because this is a burden of production, and not a burden of proof, the Court's determination as to whether Defendant Board has met its burden "can involve no credibility assessment." *St. Mary's Honor Ctr.,* 509 U.S. at 509. Here, Defendant Board claims Plaintiff's request for early consideration was not granted because she had not been a professor at the University long enough to receive promotion or tenure. More specifically, Defendant Board contends that, at the time Plaintiff made her request, the University policy required professors to serve a minimum probationary period of five years before being reviewed. Plaintiff, however, was still serving her third year at the time of the request. Additionally, Defendant Board points to concerns about the

strength of Plaintiff's publications at the time of the request. This showing is sufficient to satisfy Defendant Board's burden.

**c. Pretext**

Faced with Defendant Board's legitimate nondiscriminatory reason, Plaintiff "must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for the discrimination.'" *Reeves,* 530 U.S. at 143 (quoting *Burdine,* 450 U.S. at 253). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated . . . [However, t]his is not to say that such a showing by the plaintiff will *always* be adequate." *Id.* at 148; *see also Hinson,* 231 F.3d at 831. Additionally, "conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where an employer has offered extensive evidence of legitimate, nondiscriminatory reasons for its actions." *Carter v. City* of *Miami,* 870 F.2d 578, 585 (11th Cir. 1989) (internal quotation marks omitted).

Therefore, in determining whether summary judgment is appropriate, the Court should consider "'the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered.'" *Hinson,* 231 F.3d at 832 (quoting *Reeves,* 530 U.S. at 148-49). For the following reasons, the Court finds that Plaintiff has not met this burden.

Here, Plaintiff has not demonstrated a basis for which a reasonable fact-finder could determine that Defendant Board's proffered reasons are pretextual. Defendant Board explained that Plaintiff's request did not comply with the

University's policy of imposing a five-year probationary period on its faculty. Yet Plaintiff has failed to direct the Court to any instances in which the University did not comply with that policy. Furthermore, Plaintiff has not challenged the concerns about the strength of her publications. While it is true that a plaintiff's prima case may be combined with evidence of pretext to establish an inference of discrimination, *see Reeves*, 530 U.S. at 148, Plaintiff has made no such effort to disprove Defendant Board's reason. With no evidence of pretext, Plaintiff's retaliation claim under Title VII does not survive summary judgment. Accordingly, Defendant Board's motion for summary judgment regarding Plaintiff's retaliation claim under Title VII is hereby GRANTED.

**3. Title VII Disparate Treatment Claims**

Plaintiff also claims that Defendant Board discriminated against her on the basis of gender in violation of Title VII. Because Plaintiff has not provided direct evidence of discrimination, the Court must determine whether she has provided sufficient indirect evidence to support an inference of discrimination. As with Title VII claims for retaliation, in analyzing a Title VII claim for disparate treatment based on indirect evidence, courts have consistently applied the burden-shifting framework set out in *McDonnell Douglas* and *Burdine*. *See, e.g., Durley v. APAC, Inc.*, 236 F.3d 651, 656-59 (11th Cir. 2000). In light of this framework, Defendant Board contends that Plaintiff's claim fails because (1) she has not established a prima facie case of discrimination, and (2) she has not demonstrated that Defendant Board's legitimate nondiscriminatory reasons for acting are pretextual. For the following reasons, the Court finds that Plaintiff has not established a prima facie case of discrimination.

"Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to

permit an inference of discrimination." *Holifield v. Reno,* 115 F.3d 1555, 1562 (11th Cir. 1997) (per curiam). In *McDonnell Douglas,* the Supreme Court required a plaintiff seeking to establish a prima facie case of race discrimination through the use of indirect evidence to demonstrate that (1) she was within a protected class, (2) she suffered an adverse employment action, (3) similarly situated individuals outside the protected class were treated differently, and (4) she was qualified for the job. *See McDonnell Douglas Corp.,* 411 U.S. at 804; *see* also *Durley,* 236 F.3d at 655-56. Defendant Board contends that the 1995 and 1996 non-renewal decisions did not constitute adverse employment actions and that Plaintiff has not shown that similarly situated males were treated differently than she.

**a. Adverse Employment Action**

As previously recognized, the only decision by Defendant Board that could constitute an adverse employment action for purposes of Title VII was its 1996 denial of Plaintiff's request for early promotion and tenure review. *See supra* Part II.B.2.a.ii.

**b. Similarly Situated Individuals Outside the Protected Class**

Defendant Board also contends that Plaintiff has failed to make out a prima facie case regarding the denial of early promotion and tenure review because she has failed to demonstrate that a similarly situated male was treated differently. The only different treatment of which Plaintiff complains is the fact that Dr. Tindall was not subjected to questions about his mental health or medication at during the third-year review. However, for several reasons, this contention does not satisfy Plaintiff's prima facie burden regarding either decision about promotion and tenure.

As an initial matter, Plaintiff has not demonstrated that Dr. Tindall received early promotion or tenure, let alone early consideration. Therefore, Plaintiff has not demonstrated how Defendant Board has treated Dr. Tindall

any differently as to the actual decision to grant or denial of early review.

Plaintiff seeks to save this claim by arguing that the fact that the committee asked her questions about her mental health, and did not ask Dr. Tindall such questions, constitutes "different" treatment. This argument also fails, however, for two reasons. First, there is no indication that the third-year review, which occurred *after* the denial of early consideration for promotion and tenure, is probative of discriminatory animus being a motivating factor in the denial. Second, even assuming that conduct *subsequent* to the decision could provide evidence of discrimination, Defendant Board's treatment of Dr. Tindall does not create an inference of disparate treatment based on gender. Title VII does not guarantee that all individuals must be treated exactly the same in all aspects of the job. Quite the contrary, "Title VII requires employers to treat their employees as *individuals,* not 'as simply components of a racial, religious, sexual or national class.'" *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Compo Plans v. Norris,* 463 U.S. 1073, 1083 (1983) (quoting *City of L.A., Dep't of Water & Power v. Manhart,* 435 U.S. 702, 708 (1978) (emphasis added). Furthermore, employees are not entitled to identical treatment in the workplace under Title VII. *See Worthy v. Widnall,* 900 F.Supp. 475, 481-82 (M.D. Ga. 1995) (noting that unequal time division between workers for "undesirable assignments" does not constitute different treatment). Here, there is no evidence that the panel treated Plaintiff any differently because of her gender; rather, the panel asked her questions about her mental health only because they were relevant to her individually. In fact, it is questionable whether or not Dr. Tindall was in fact similarly situated for purposes of the review. *See Marshall v. W. Grain* Co., 838 F.2d 1165, 1167-68 (11th Cir. 1988) (per curiam) (recognizing that whether comparators were similarly situated is a "crucial" element in employment discrimination cases). The panel had knowledge about the

mental history only of Plaintiff. There is no indication that the panel had any corresponding information regarding Dr. Tindall that would warrant similar concerns about his mental health. Moreover, the fact that Plaintiff was asked questions about her mental state (in and of itself) provides no indication that Defendant Board harbored any discriminatory animus against her based on *gender*. Rather, any difference in questions appears to have arisen from the fact that, by the very nature of an interview, a panel must ask questions on matters specific to the interviewee. In any case, neither Plaintiff nor Dr. Tindall received different treatment as to the ultimate employment decision at issue - the grant or denial of early promotion and tenure.

Because Plaintiff has not demonstrated that she was treated differently than a similarly situated male employee, she has failed to establish a prima facie case for disparate treatment under Title VII. Accordingly, Defendant Board's motion for summary judgment as to Plaintiff's Title VII claim for disparate treatment is hereby GRANTED.[3]

***C. Title IX Claims***

Plaintiff has also brought Title IX claims against Defendants. However, for several reasons, each of Plaintiff's claims must fail. As an initial matter, the law is clear that a Plaintiff cannot sue individuals under Title IX. *See Hartley v. Parnell,* 193 F.3d 1263, 1270 (11th Cir. 1999) (recognizing that "[i]ndividual school officials . . . may not be held liable under Title IX"). Rather, only recipients of federal funding can be held liable under Title IX. *See Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 638-39 (1999). Therefore, Plaintiff's Title IX claims

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[3] Even assuming that Plaintiff had demonstrated a prima facie case of discrimination, Defendant's motion for summary judgment as to this claim must ultimately be granted. The Court has already determined that she has failed to establish that Defendant Board's legitimate nondiscriminatory reasons for acting were pretextual. *See supra* Part II.B.2.c.

against Defendants Firestone, Nix, and Squires must fail as a matter of law. Furthermore, her claims against Defendant Board must similarly fail because they are preempted by her claims under Title VII.

While the Eleventh Circuit has not yet addressed the issue of whether Title VII preempts Title IX, the Court finds substantial support for recognizing this preclusive effect. Both the Fifth and Seventh Circuits have similarly recognized Title VII's preclusive effect on Title IX claims. *See Waid v. Merrell Area Pub. Sch.,* 91 F.3d 857, 861-62 (7th Cir. 1996); *Lakoski v. James,* 66 F.3d 751, 753-58 (5th Cir. 1995). In reaching this conclusion in *Lakoski,* the Fifth Circuit recognized a concern that allowing plaintiffs to bring such claims through Title IX would allow litigants to bypass the procedural safeguards set out by Title VII. *See Lakoski,* 66 F.3d at 753. This concern has been echoed by several district courts within the Eleventh Circuit (including this Court) that have also recognized such a preclusive effect when the relief sought under Title IX is available under Title VII as well. *See Morris v. Wallace Cmty. Coll.-Selma,* 125 F.Supp.2d 1315, 1343 (S.D. Ala. 2001); *Blalock v. Dale County Bd. of Educ.,* 84 F.Supp.2d 1291, 1297-99 (M.D. Ala. 1999); *Gibson v. Hickman,* 2 F.Supp.2d 1481, 1483-84 (M.D. Ga. 1998). The Court agrees that these concerns weigh against allowing parallel claims under Title VII and Title IX and therefore finds that Plaintiff's Title IX claim is preempted by her Title VII claim against Defendant Board. Accordingly, Defendants' motions for summary judgment as to Plaintiff's Title IX claims are hereby GRANTED.

***D. ADA Claims***

Plaintiff also contends that Defendants discriminated against her in violation of Title I of the ADA, which prohibits the States and other employers from "discriminat[ing] against a qualified individual with a disability because of the disability." 42 U.S.C.A. 12112(a) (West 1995). For the following reasons, however, the Court

finds that none of her ADA claims survives summary judgment. Because the ADA provides for relief against only the employer, Plaintiff's claims against Defendants Firestone, Nix, and Squires, in their individual capacities, must fail. *See Mason v. Stallings,* 82 F.3d 1007, 1009 (11th Cir. 1996) (recognizing that the ADA "does not provide for individual liability, only for employer liability"); *see also Scott v. Estes,* 60 F.Supp.2d 1260, 1267 (M.D. Ala. 1999). Additionally, as with Title VII, claims against these Defendants in their official capacities would be duplicative of those claims brought against Defendant Board. *See Busby,* 931 F.2d at 772.

Finally, Plaintiff's ADA claim against Defendant Board is barred by the Eleventh Amendment. The Eleventh Amendment prohibits suits against state entities and state officials acting in their official capacities in federal court for monetary relief, unless the state either consents to suit or waives its immunity or unless Congress abrogates that immunity by statute. *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 72-73 (1996); *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984). Because Plaintiff has satisfied none of these requirements, the Eleventh Amendment bars Plaintiff's ADA claims against Defendant Board.

As a preliminary matter, Congress has not abrogated the States' Eleventh Amendment immunity in its passage of the ADA. *See Bd. of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356, 374 (2001) (finding no abrogation because Title I of the ADA does not address "a pattern of discrimination by the States which violates the Fourteenth Amendment"); *see also Seminole Tribe* of *Fla.,* 517 U.S. at 72-73. Nor has Plaintiff demonstrated that Georgia has either waived its Eleventh Amendment immunity or consented to be sued in federal court. In order to demonstrate such consent or waiver, Plaintiff must first demonstrate that Georgia has made "a clear declaration that it intends to submit itself to [federal] jurisdiction" and thereby waived any Eleventh

Amendment immunity for such suits. *Coll. Say. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (internal quotation marks omitted); *see also Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 n.1 (1985); *Halderman,* 465 U.S. at 99 (noting that this consent must be "unequivocally expressed"). Georgia has made no such statement. In fact, in its provisions concerning sovereign immunity, the Georgia Constitution expressly provides that "no waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution." Ga. Const. Art. I, § 2, ¶ 9(f). Additionally, while the Georgia Legislature did waive sovereign immunity with respect to the Georgia Tort Claims Act, that statute also provides that "[t]he State does not waive any immunity with respect to actions brought in the courts of the United States." O.C.G.A. § 50-21-23(b) (1998). Plaintiff likewise fails to direct the Court to any evidence that the State has consented to have this specific action brought before a federal court. Accordingly, Defendants' motions for summary judgment as to Plaintiff's ADA claims are hereby GRANTED.

***E. Section 1983 Claims***

Before addressing the merits of Plaintiff's § 1983 claims, the Court finds it necessary to determine which Defendants are proper parties. The Court first notes that Plaintiff's claims against Defendant Board brought pursuant to § 1983 fail as a matter of law. Section 1983 provides a procedural mechanism through which a plaintiff can sue a "person who, under color of . . . State" law is responsible for the plaintiff's deprivation of a constitutional right. 42 U.S.C.A. § 1983 (West 1984 & Supp. 2001). However, the Supreme Court has unambiguously recognized that "a State is not a person within the meaning of § 1983." *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 64 (1989); *see also Robinson v. Georgia Dep't of Transp.*, 966 F.2d 637, 640 (11th Cir. 1992). Furthermore, "Congress in passing §

1983, had no intention to disturb the States' Eleventh Amendment immunity" by providing a federal forum for plaintiffs seeking to sue state actors for such violations of their civil liberties. *Will,* 491 U.S. at 66; *see also Alden v. Maine,* 527 U.S. 706, 736 (1999). Therefore, Defendant Board's motion for summary judgment as to all of Plaintiffs § 1983 claims is hereby GRANTED.

Additionally, the Court notes that Plaintiff's § 1983 claims against Defendants Firestone, Nix, and Squires, in their official capacities, must also fail. The Eleventh Circuit has recognized that "when an officer is sued under § 1983 in his or her official capacity, the suit is simply another way of pleading an action against an entity of which an officer is an agent." *Busby,* 931 F.2d at 776 (internal quotation marks omitted); *see also Owens v. Fulton County,* 877 F.2d 947,951 n.5 (11th Cir. 1989) (per curiam). Because § 1983 does not provide a cause of action against Defendant Board, allowing Plaintiff to sue Defendants Firestone, Nix, and Squires in their official capacities under § 1983 would also be inappropriate. Accordingly, the motions for summary judgment by Defendants Firestone, Nix, and Squires as to all of Plaintiffs § 1983 claims against them in their official capacities are hereby GRANTED. Therefore, Plaintiff's § 1983 claims remain only against Defendants Firestone, Nix, and Squires in their individual capacities.

While a government official can be sued under § 1983 in his individual capacity, such an official is sometimes entitled to the affirmative defense of qualified immunity. *See Busby,* 931 F.2d at 772. Here, Defendants Firestone, Nix, and Squires have each properly raised the affirmative defense of qualified immunity to the § 1983 claims discussed below. The Court will therefore examine each of Plaintiff's individual-capacity claims against these Defendants accordingly.

The affirmative defense of qualified immunity serves to protect government officials from being sued for conduct

resulting from the administration of their official duties. The Supreme Court has recognized the policy that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Therefore. "[q]ualified immunity protects government officials performing discretionary functions from civil trials . . . and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lassiter v. Alabama A&M Univ.,* 28 F.3d 1146, 1149 (11th Cir. 1994) (quoting *Harlow,* 457 U.S. at 815). Analysis of the qualified immunity defense involves a two-part inquiry. *See Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir. 2000). First, the defendant asserting this defense must demonstrate that he was acting within the scope of her discretionary authority at the time of the alleged violation. *See id.* Second, if this showing is made, the plaintiff must prove that the defendant's conduct violated some clearly established right. *See id.* Here, Plaintiff has not challenged that Defendants Firestone, Nix, and Squires were acting within the scope of their discretionary authority. Therefore, the Court need determine only whether the conduct violated any clearly established rights. In order to establish the violation of a clearly established right, a plaintiff must first demonstrate that she has suffered from the deprivation of a currently cognizable constitutional right. *See Conn v. Gabbert,* 526 U.S. 286, 290 (1999); *Chesser v. Sparks,* 248 F.3d 1117, 1122 (11th Cir. 2001). If the violation of a currently cognizable right is determined, the plaintiff must then demonstrate that the right was clearly established at the time of the conduct such that a reasonable person would have been put on notice of the constitutional violation. *See Conn,* 526 U.S. at 290; *Chesser,* 248 F.3d at 1122. Having established the standards for analysis in light of the qualified

immunity defense, the Court will now address the merits of each claim.

### 1. Retaliation in Violation of the First Amendment

Defendants Firestone, Nix, and Squires first contend that Plaintiff has failed to allege a First Amendment retaliation claim under § 1983. As noted above, because this claim involves the defense of qualified immunity, the Court must perform the two-prong analysis to determine whether there was a deprivation of a currently cognizable right, and if so, whether that right was clearly established at the time of the conduct.

Under § 1983, Plaintiff bears the burden of demonstrating that Defendants Firestone, Nix, and Squires, while acting under color of state law, engaged in conduct that violated a currently cognizable constitutional right. In order to succeed on a First Amendment retaliation claim, a plaintiff must demonstrate that the defendant engaged in conduct to retaliate against her for some form of protected speech. This analysis is tempered by two opposing policies: while the government cannot retaliate against a public employee for making protected speech, neither is the public employee's First Amendment speech entitled to absolute protection. *See Morgan v. Ford,* 6 F.3d 750, 753-54 (11th Cir. 1993) (per curiam); *Bryson v. City of Waycross,* 888 F.2d 1562, 1565 (11th Cir. 1989).

The Eleventh Circuit has developed a four-prong test based on Supreme Court precedent for determining whether a defendant has violated this First Amendment right. *See Rice-Lamar v. City of Ft. Lauderdale,* 232 F.3d 836, 841 (11th Cir. 2000); *Bryson,* 888 F.2d at 1565-66. Under the first prong, the Court examines whether the plaintiff's speech constitutes speech on a "matter of public concern." *Rankin v. McPherson,* 483 U.S. 378, 384 (1987). If the expression does not constitute speech on a matter of public concern, then under the second prong the Court weighs the plaintiff's

First Amendment interest against "the interest of the state, as an employer, in promoting the efficiency of the public services it performs." *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Should the plaintiff prevail on this balance, then the Court turns to the third prong to determine whether the speech was a substantially motivating factor for the conduct in question. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). Finally, if the plaintiff demonstrates that the speech was a substantial factor for the adverse employment action, the fourth prong requires the defendant to prove by a preponderance of the evidence that it would have made the same decision absent the speech in question. *See id.; Bryson,* 888 F.3d at 1566.[4] However, before even engaging in the four-part test described above, a plaintiff must make a threshold showing that she suffered from an adverse employment action. *See McCabe v. Sharrett,* 12 F.3d 1558, 1562 n.3 (11th Cir. 1994).

**a. Adverse Employment Action**

In order to have a valid First Amendment retaliation claim under § 1983, the form of the retaliation that constitutes the basis of a plaintiff's claim must constitute an adverse employment action. *See id.* at 1563. For purposes of First Amendment analysis, any conduct "that is likely to chill the exercise of constitutionally protected speech" will constitute retaliation. *Goffer v. Marbury,* 956 F.2d 1045, 1049 n.1 (11th Cir.1992). Such action "includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands." *McCabe,* 12 F.3d at 1563; *see also Rutan v. Republican Party,* 497 U.S. 62, 79 (1990). Here, the only adverse employment action for which Plaintiff could bring a

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[4] The first two prongs constitute the *Pickering* balance test and are to be determined by the Court as a matter of law. *See Anderson v. Burke County,* 239 F.3d 1216, 1219-20 (11th Cir. 2001) (per curiam); *Bryson,* 888 F.2d at 1565. The third and fourth prongs of the analysis each involves questions of fact. *See Anderson,* 239 F.3d at 1219-20; *Bryson,* 888 F.2d at 1565.

First Amendment retaliation claim is the 1996 denial of her request for early promotion and tenure.

As discussed in Part II.B.2.a.ii., neither of the votes not to renew her contract had a materially adverse effect on Plaintiff's job. Plaintiff received no loss of benefits or salary, and at no point did she lose her position as professor. Moreover, neither of the initial decisions for non-renewal resulted in an ultimate employment action - in the first instance Dean Anderson decided not to affirm the committee's non-renewal vote; in the second instance, the University's Grievance Committee rectified the decision before any action against Plaintiff was taken. In contrast to those decisions, however, the failure to grant Plaintiff's 1996 request for early promotion and tenure review constitutes an adverse employment action because it may have directly precluded Plaintiff from receiving benefits and a promotion to which she was otherwise entitled.

**b. Matters of Public Concern**

Defendants Firestone, Nix, and Squires contend that Plaintiff's First Amendment retaliation claims must fail because the speech in question did not involve a matter of public concern. Because workplace speech often does not involve matters of either purely public or purely private concern, courts should determine the "main thrust" of the employee's speech: whether she "spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee." *Morgan,* 6 F.3d at 754. To make this determination, it is necessary to examine the "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers,* 461 U.S. 138, 147-48 (1983); *see also Maggio v. Sipple,* 211 F.3d 1346, 1352 (11th Cir. 2000). Here, Plaintiff bases her claim on several instances of speech. First, she points to the minority report that she and Dr. Tindall filed at the completion of the search committee's recommendation. She also alludes to her discussion with Associate Dean Morrow about her concerns of gender

discrimination regarding the decision not to hire Dr. LeBlanc, as well as her open support of Dr. LeBlanc's filing of a discrimination claim.

Here, Plaintiff contends that her speech on gender discrimination in the workplace constitutes speech on a matter of public concern. While issues of gender discrimination are generally considered to be matters of great social importance, however, speech on this subject does not constitute speech on a matter of public concern per se. *See Morgan,* 6 F .3d at 755; *Kurtz v. Vickrey,* 855 F .2d 723, 727 (11 th Gir. 1988) (noting that merely because the public would have interest in the speech has little effect on whether a matter is one of public concern). Rather, when the employee's speech primarily involves matters of self-interest, it tends to lose its constitutional protections. The Supreme Court has made it clear that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

*Connick,* 461 U.S. at 147. Therefore, to be protected, it is necessary not only that the speech involve matters of social importance, but also that the speech not be primarily oriented toward improving the plaintiff's own work conditions and environment. *See Morgan,* 6 F.3d at 755 (finding that while the plaintiff's speech dealt with discrimination of a co-worker, the changes sought would improve her own work. conditions and that she "primarily spoke as an employee in order to improve her own work environment"); *Johnson v. Clifton,* 74 F.3d 1087, 1092 (11th Cir. 1996) (recognizing that

speech "motivated by personal concerns" is not protected); *see also Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1540 (11th Cir. 1994) (finding that speech was not self-motivated when it "supported the discrimination and harassment claims of *other* individuals, not of [Plaintiff] herself"); *Marshall v. Allen,* 984 F.2d 787, 796 (7th Cir. 1993) (noting that a male employer's speech in opposition to discrimination against females was protected because it "appear[ed] not to have arisen from a private dispute between himself and the [employer]" and there was "no allegation that Mr. Marshall's speech was tied to a personal interest"). Here, it did not promote Plaintiff's self-interest to voice concerns about gender discrimination in the committee's hiring decision, and it does not appear that Plaintiff's primary motivation for speaking was to improve her own work environment. In fact, Plaintiff spoke out about the treatment of Dr. LeBlanc *despite* fears that such speech could harm her job. Furthermore, whether or not Defendants continued discriminating against applicants would appear to have had little effect on the employment status of Plaintiff, who already had a job. Because, in contrast to the circumstances in *Morgan* and *Maggio,* Plaintiff's complaints focused on the treatment of individuals other than herself, her speech did not take the "form of a private employee grievance." *Maggio,* 211 F .3d at 1353; *see also Morgan,* 6 F.3d 755.

Defendants Firestone, Nix, and Squires respond that gender discrimination was not the primary purpose of Plaintiff's speech. Rather, they contend, Plaintiff was primarily concerned that the committee had favored an internal candidate and failed to review Dr. LeBlanc's qualifications adequately. Were this true, Plaintiff's speech probably would not constitute speech on a matter of public concern, because the primary concern would be focused only on disagreements with the administration of legal hiring practices. *See Harris v. Victoria Indep. Sch. Dist.,* 168 F.3d 216, 220-21 (5th Cir. 1999) (recognizing that "a federal court is not the appropriate forum in which to seek redress over"

such issues of internal management and disagreement about the mere administrative aspects of the school); *Kurtz,* 855 F.2d at 730 (recognizing that disputes about internal management are not issues of public concern). However, the record provides strong support for the inference that Plaintiff spoke out because of her concern about gender discrimination in the decision to hire Dr. Kaufman. *See supra* Part II.B.2.a.i.

Additionally, the fact that Plaintiff did not address the public directly on these matters does not strip this speech of its status as speech on a matter or public concern. The Court recognizes that a claim of public concern sometimes "loses force" when the plaintiff has taken "no affirmative steps . . . to inform the public at large about . . . the problems with which he was so gravely concerned." *Kurtz,* 855 F.2d at 729. However, the mere fact that a plaintiff chooses to speak out in a private forum, rather than to make the issue public, does not necessarily strip the speech of its constitutional protections. *See Givhan v. W. Line Consol. Sch. Dist.,* 439 U.S. 410, 414 (1979); *Gonzalez v. Lee County Hous. Auth.,* 161 F.3d 1290, 1296 (11th Cir. 1998). Here, the fact that Plaintiff chose these fora as the most appropriate, or most effective, means of voicing her concerns does not outweigh the other evidence that the speech was not self-motivated and dealt with issues of social importance. Accordingly, the Court finds that Plaintiff spoke out on a matter of public concern.

**c. *Pickering* Balance**

The Court next weighs Plaintiff's interest in free speech against "the interest of the state, as an employer in promoting the efficiency of the public services it performs through its employees." *Pickering.* 391 U.S. at 568; see *also Rankin,* 483 U.S. at 388; *Ferrara v. Mills,* 781 F.2d 1508, 1513 n.6 (11th Cir. 1986) (noting the "distinction between speech to which no constitutional right attaches [and] speech that, while protected, is . . . outweighed by the government's interest" (internal quotation marks omitted). It is necessary to

balance these interests by focusing on (1) how disruptive the speech was; (2) the time, place and manner of the speech; and (3) the context of the speech. *See Rice-Lamar,* 232 F.3d at 841; *see also Pickering,* 391 U.S. at 570-73; *Maples v. Martin,* 858 F.2d 1546, 1554 (11th Cir. 1988). Viewing these factors as a whole, the Court finds that the *Pickering* balance weighs in favor of the Plaintiff.

Plaintiff's speech caused minimal disruption to the workplace. She voiced these concerns first by aiding in the production of the minority memorandum. This document was read to the other committee members and then sent to the administrative department heads. This document was not sent throughout the school as a means of disrupting the affairs of the department. Additionally, Plaintiff voiced her concerns primarily in two fora: (1) within the committee meetings in which the challenged decision was made and (2) to administrative officials in meetings scheduled to investigate these matters. Each of these places was an appropriate forum for voicing these concerns. Moreover, there is no evidence that Plaintiff caused great disruption in her efforts to gain support for Dr. LeBlanc; in fact, the record indicates that she contacted only one other faculty member, Ms. DelRey. Finally, Plaintiff did not make a public spectacle of the issue, but sought to challenge what she felt to be discriminatory conduct through the least disruptive means available. In light of these circumstances, the Defendant Board appears to have had little countervailing interest in limiting that speech. As previously noted, concerns about gender discrimination involve important social interests, and Plaintiff went about addressing this issue in a manner that had minimal disruptions on the workplace.

**d. Substantially Motivating Factor**

Once a plaintiff has prevailed on the balancing test, "the fact-finder determines whether the employee's speech played a 'substantial part' in the government's decision to

demote or discharge the employee." *Bryson,* 888 F.2d at 1565 (quoting *Mt. Healthy,* 429 U.S. at 285). As previously discussed, Plaintiff has created a genuine issue of material fact as to whether the 1996 refusal to grant early review of promotion and tenure was substantially motivated by her speech for the purposes of Defendant Board's liability under Title VII. For purposes of Plaintiff's § 1983 claim for First Amendment retaliation, the Court must further determine whether the conduct of Defendants Firestone, Nix, and Squires, individually, was substantially motivated by her speech. As to Defendant Squires, Plaintiff has provided almost no basis whatsoever for linking any discriminatory animus on his part to the 1996 denial of early consideration for promotion and tenure. In fact, the only conduct by him about which she complains took place during the third-year review - an event taking place after the denial of her early review request. Additionally, Plaintiff admits that Defendant Nix did not participate in the initial denial of her request and that he did not vote when Plaintiff's request for reconsideration of that decision was denied. Finally, Plaintiff cites no specific conduct by Defendant Firestone in relation to the denial of early review to support her claim that his actions were substantially motivated by her speech. However, even assuming, arguendo, that their conduct was substantially motivated by Plaintiff's protected speech, Defendants Firestone, Nix, and Squires have shown, by a preponderance of the evidence, that they would have made the same decision even in the absence of Plaintiff's protected speech.

**e. Same Decision**

Once a plaintiff creates a genuine issue of material fact as to whether her speech substantially motivated the adverse employment action, the defendant must be given the opportunity to demonstrate "by a preponderance of the evidence" that the same decision would have been reached "even in the absence of the protected conduct." *Mt. Healthy,* 429 U.S. at 287. Here, as discussed regarding pretext under

Title VII, *see supra* Part II.B.2.c., University policy at the time of Plaintiff's request required a minimum of five years experience before receiving promotion and tenure; however, Plaintiff had not yet finished her third year at the time of her request. Additionally, Defendants contend that there were legitimate concerns with the strength of Plaintiff's publications, and Plaintiff has not provided a basis for disbelieving this concern motivated the decision.

Defendants have proven by a preponderance of the evidence that despite any potential discriminatory animus, the same decision to deny early review for promotion and tenure would have been reached anyway. Yet Plaintiff has not "come forward with significant probative evidence demonstrating the existence of a triable issue of fact" contesting Defendants' showing. Defendants Firestone, Nix, and Squires have therefore shouldered their burden as to the fourth prong. *See Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115 (11th Cir. 1993) (internal quotation marks omitted). In light of this finding, Plaintiff has failed to create a genuine issue of material fact as to whether she suffered from the violation of a currently cognizable right. Because Plaintiff has established no such violation of a currently cognizable constitutional right, Defendants Firestone, Nix, and Squires are entitled to qualified immunity. *See Hartley,* 193 F.3d at 1271. Accordingly the motions for summary judgment of Defendants Firestone, Nix, and Squires regarding Plaintiff's § 1983 claims for retaliation under the First Amendment are hereby GRANTED.

**2. Equal Protection Claims Under the Fourteenth Amendment**

While Plaintiff has labeled Count II of her First Amended Complaint as a claim for "sex discrimination in violation of the Plaintiff's Fourteenth Amendment Right to Equal Protection," the numbered paragraphs of the count actually allege two claims: equal protection violations based

on both disparate treatment and retaliation. The Court will therefore examine each of these claims in turn.

**a. Retaliation**

The Eleventh Circuit has expressly held that "while the right to be free from retaliation is clearly established as a *first amendment* right and as a *statutory* right under Title VII . . . no clearly established right exists under the *equal protection* clause to be free from retaliation." *Ratcliff v. Dekalb County,* 62 F.3d 338, 340 (11th Cir. 1995). Therefore, the only remedies available to Plaintiff would come under Title VII and the First Amendment. Because Plaintiff has not shown a violation of a currently cognizable constitutional right, Defendants Firestone, Nix, and Squires are entitled to qualified immunity for Plaintiff's § 1983 claims for retaliation under the equal protection clause, and their motions for summary judgment regarding these claims are hereby GRANTED. *See Hartley,* 193 F.3d at 1271.

**b. Disparate Treatment**

Because § 1983 equal protection claims generally "have the same requirements of proof and use the same analytical framework" as Title VII disparate treatment claims, the Court can "address the Title VII claim with the understanding that the analysis applies to the § 1983 claim as well." *Standard v. A.B.E.L. Servs., Inc.,* 161 F.3d 1318, 1330 (11th Cir. 1998); *see also Alexander v. Fulton County,* 207 F.3d 1303, 1314 n.6 (11th Cir. 2000); *Cross v. Alabama State Dep't of Mental Health & Retardation,* 49 F.3d 1490, 1507-08 (11th Cir. 1995) (noting that "when § 1983 is used as a parallel remedy for violation of Title VII, the elements of the two causes of action are the same"). The Court has already determined that Plaintiff has failed to make out a prima facie case of disparate treatment based on gender because she cannot demonstrate that she was treated differently than a similarly situated male. *See supra* Part II.B.3.a.ii. As such, Plaintiff cannot demonstrate that she has suffered from the deprivation of a currently cognizable constitutional right.

Accordingly, having found no violation of a currently cognizable constitutional right, Defendants Firestone, Nix, and Squires are entitled to qualified immunity for Plaintiff's § 1983 equal protection claims of discrimination under the Fourteenth Amendment, and their motions for summary judgment regarding these claims are GRANTED. *See Hartley,* 193 F.3d at 1271.

## III. CONCLUSION

Accordingly, the Court finds that Defendants' motions for summary judgment are hereby GRANTED.

The Court notes that Defendants Firestone, Nix, and Squires have not discussed in their motions Plaintiff's § 1983 claim for deprivation of a liberty interest without due process as alleged in Count V of her First Amended Complaint or to Plaintiff's § 1983 claim for equal protection violations based on disability as alleged in Count III of the First Amended Complaint. Therefore, these two claims still remain before the Court. However, because of the complicated procedural history of this case, the Court hereby allows Defendants Firestone, Nix, and Squires additional time to file a motion for summary judgment limited to these two remaining claims. Accordingly, Defendants Firestone, Nix, and Squires shall have until April 1, 2002, to file a motion for summary judgment concerning these two claims. Should they do so, Plaintiff shall have twenty days from the filing of that motion to file a response, and Defendants shall have ten days from the filing of the response to file a reply.

SO ORDERED, this 12th day of March, 2002.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action No. 3:97-CV-95 (DF)

CAROL STAVROPOULOS,
PLAINTIFF,
V.
EVAN FIRESTONE, W. ROBERT NIX, WILLIAM SQUIRES AND BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
DEFENDANT.

**ORDER**

On March 13, 2002, the Court entered an order granting several motions for summary judgment. Additionally, the order expressly provided Defendants Firestone, Nix and Squares ("Defendants") the opportunity to file a supplemental motion addressing two remaining Fourteenth Amendment claims raised in Plaintiff's amended complaint. Pursuant to that provision, Defendants Firestone, Nix and Squires have filed a Supplemental Motion for Summary Judgment [tab # 160] asserting that they are entitled to qualified immunity for Plaintiff's claims of violations of her due process and equal protection rights under the Fourteenth Amendment.

Plaintiff responds by conceding that in light of the Court's March 13, 2002 order, her equal protection claim must be dismissed. Therefore, the only question still remaining before the Court is whether Defendants Firestone, Nix and Squires are entitled to qualified immunity from any liability stemming from Plaintiff's claim that she was deprived of a liberty interest in violation of her Fourteenth Amendment due process rights.

## I. FACTUAL BACKGROUND

Plaintiff obtained employment with the University of Georgia in 1993 as a professor in the education department of the School of Art. At all times relevant to this action, Defendant Firestone was the Director of the School of Art and Defendant Nix was the Chairman of the Art Education program.

During the fall semester of 1994, Defendant Firestone selected Plaintiff and five others to serve on a search committee that was charged with finding a suitable candidate for the computer artist position. The committee selected Dr. Kaufman, a male candidate. Disagreeing with this decision, Plaintiff and another colleague, Dr. Tindall, voiced concerns that Dr. LeBlanc, a female candidate, was better-qualified and had not been given fair treatment due to her gender. Plaintiff again voiced these concerns at a full meeting of the Art Department and subsequently filed a minority report with Dr. Anderson, Dean of the School of Art, discussing these concerns about the lack of gender diversity in the computer field.

In the spring of 1995, the majority of tenured faculty of the School of Art voted not to renew Plaintiff's employment contract for the 1996-1997 academic year. Upon learning of the non-renewal vote, Plaintiff complained to the Dean's office. In response to this complaint, Dr. Morrow, Associate Dean of the School of Art, asked Defendant Firestone to develop a "separate personnel file" explaining the basis of this vote. To create this file, Defendant Firestone requested letters and evaluations from other faculty members concerning Plaintiff's behavior and job performance, including a memorandum from Defendant Nix. Upon reviewing both this file and the record of the committee's non-renewal decision, Dr. Morrow and Dr. Anderson decided not to support the non-renewal vote because it was too difficult to reconcile with Plaintiff's excellent performance evaluations.

In November 1995, Defendant Squires wrote Defendant Firestone a letter concerning Plaintiff's absence from a meeting where one of her students presented class-related work.

During the 1995-1996 academic year, Plaintiff made a request to be considered for early tenure and promotion. However, in February 1996, the tenured faculty voted to deny this request. The next month, Plaintiff requested a special review committee on the matter, but the tenured faculty voted against the appointment of a such a committee. In support of this decision, Defendants noted (1) that Plaintiff lacked a strong record of publications, and (2) the University's policy that all faculty must undergo a five-year probationary period before receiving promotion or tenure. At the time of Plaintiff's early request, she was still in her third year as a professor at the University—still within the minimum probationary period.

Toward the end of that same year, Plaintiff underwent her third-year review, a process used by the faculty to assess a professor's progress toward attaining tenure. It was determined that Defendant Firestone's separate personnel file would not be used in conjunction with the review. At the initial committee meeting, Defendant Firestone submitted a fact memorandum discussing events concerning Plaintiff's allegations of discrimination in the computer artist search. Defendant Firestone also allegedly solicited faculty members to speak to the committee about negative experiences with Plaintiff. Defendant Nix spoke about concerns of Plaintiff's health, and Defendant Squires prepared a memorandum discussing concerns that Plaintiff suffered from a mental illness. During the committee meeting, Plaintiff was also given the opportunity to answer questions and respond to any concerns felt by the committee. At that time, some members asked Plaintiff questions about her mental health, medical leave, and related medications that she may have taken.

On May 27, 1996, the third-year review committee presented its report to the tenured faculty who were meeting to vote on the renewal of Plaintiff's 1997-1998 employment contract. This report included memoranda submitted faculty members such as Defendant Nix and Defendant Squires. Plaintiff's written response to the committee's recommendation was also presented to the faculty. At the conclusion of these proceedings, the tenured faculty voted not to renew Plaintiff's contract for 1997-1998. On June 13, 1996, Defendant Firestone informed Plaintiff of the non-renewal vote.

Plaintiff then filed a grievance with the College of Arts & Sciences Faculty Senate Grievance Panel, which had a hearing beginning on June 9, 1997. Plaintiff was represented by an attorney at these proceedings. On June 23, 1997, the Panel issued a report stating its opinion that the decision not to renew Plaintiff's contract had resulted (1) from discrimination against her on the basis of a perceived disability and gender, and (2) in retaliation for her conduct regarding the 1995 computer artist position selection. Based on these concerns, and after examining the separate personnel file, the Panel recommended that Plaintiff retain her position. Pursuant to this recommendation, Plaintiff retained her position as professor for the 1997-1998 academic year and received no loss of pay or benefits.

## II. DISCUSSION

### A. Standard of Review

Summary judgment must be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact necessary to defeat a properly supported motion for summary judgment arises only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In reviewing a motion

for summary judgment, the court must review all the evidence in the record while "draw[ing] all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see also Maynard v. Williams*, 72 F.3d 848, 851 (11th 1996).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact" and that entitle it to a judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323 (internal quotation marks omitted). If the moving party discharges this burden, the burden then shifts to the nonmoving party to go beyond the pleadings and present specific evidence showing that there is a genuine issue of material fact (i.e., evidence that would support a jury verdict) or that the moving party is not entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(e); see also *Celotex Corp.*, 477 U.S. at 324-26. This evidence must consist of more than mere conclusory allegations or legal conclusions. See *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). Under this scheme, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

**B. Section 1983 Claims for Procedural Due Process Violations**

Plaintiff contends that Defendants made false statements about her mental health and professional ability during the course of her 1995 and third-year reviews, and that these statements were made a part of her permanent record in violation of her Fourteenth Amendment procedural due process rights. In response Defendants have asserted the

affirmative defense of qualified immunity. "Qualified immunity protects government officials performing discretionary functions from civil trials . . . and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known." *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (CA11 1994) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)). To overcome the defense of qualified immunity, a plaintiff must prove that (1) she has suffered from the deprivation of a currently cognizable constitutional right, and (2) the right was clearly established at the time of the conduct such that a reasonable person would have been put on notice of the constitutional violation. *See Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Chesser v. Sparks*, 248 F.3d 1117, 1122 (11th Cir. 2001). Therefore, Defendants are entitled to qualified immunity unless Plaintiff shows that they violated her due process rights and that these rights were clearly established at the time of the violation.

Looking first to whether Defendant did in fact violate Plaintiff's due process rights, it is clear that:

> [in order to establish that a deprivation of a public employee's liberty interest has occurred without due process of law, the employee must prove that: (1) a false statement (2) of a stigmatizing nature (3) attending a governmental employee's discharge (4) was made public (5) by the governmental employer (6) without a meaningful opportunity for employee name clearing.

*Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001); see also *Buxton v. City of Plant City*, 871 F.2d 1037, 1042-43 (CA11 1989). Even assuming that there are genuine issue of material fact as to whether any of the statements at issue were false, stigmatizing and made public. Plaintiff has nevertheless failed to demonstrate (1) that these

comments were accompanied by a discharge, or (2) that she did not receive an adequate name-clearing opportunity.

Defamation on the part of the State, without the additional deprivation of some tangible interest does not constitute a deprivation of procedural due process in violation of the Fourteenth Amendment; rather a plaintiff must first demonstrate that these statements were accompanied by the "alteration of legal status." *Cannon*, 250 F.3d at 1302 (internal quotation marks omitted) (discussing basis and nature of the requirement of showing "stigma-plus" under § 1983); *see also Paul v. Davis*, 424 U.S. 693, 694 (1976). Moreover, "in this circuit a 'discharge or more' is required in order to satisfy the 'plus' element of the stigma-plus test. A transfer or a missed promotion is not enough." *Cannon*, 250 F.3d at 1302 (quoting *Oladiende v. City of Birmingham*, 963 F.2d 1481, 1486 (11th Cir. 1992) (en banc)). Because Plaintiff has failed to demonstrate any such adverse action that accompanied the statements at issue, she has not satisfied the stigma-plus showing necessary to sustain her claim under the Fourteenth Amendment.

Quite simply, Plaintiff's complaint makes no allegation that she was discharged as a result of these statements.[1] In fact, Plaintiff has failed to demonstrate how either the 1995 recommendation or the third-year review resulted in any material change in her employment. Plaintiff contends that "false and negative material was submitted to

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[1] Subsequent to the original filing of this action, but prior to Plaintiff's amended complaint, Plaintiff was due to be considered for promotion and tenure by the 1997-1998 review committee, at which time she was denied tenure and promotion. However, the complaint makes no mention whatsoever of the 1997-1998 decision. Moreover, the fact that this decision is the basis of subsequent suit against Defendants provides strong evidence that Plaintiff did not intend to file redundant claims. Accordingly, the matter currently before the Court does not involve claims for the 1997-1998 denial of tenure and promotion.

[her] third-year review committee," at which time the committee voted not to renew her employment. However, it is clear that the subsequent grievance panel reversed the faculty decision not to renew Plantiff's contract, and as a result of this decision, Plaintiff retained her position with no loss of pay or benefits. Plaintiff has also failed to demonstrate any alteration of her legal status as a result of any comments made during the 1995 committee non-renewal recommendation—it was immediately rejected and never allowed to affect Plaintiff's employment status. Accordingly, neither the 1995 non-renewal recommendation nor the third-year senior-faculty recommendation were allowed to result in a tangible alteration of Plaintiff's legal rights as neither cause Plaintiff to suffer any reduction in pay or position. See *Oladiende*, 963 F.2d at 1486 (explaining that where "no loss of income or rank occurred, and absent a discharge or more, injury to reputation itself is not a protected liberty interest").

In addition to failing to demonstrate that a defamatory statement resulted in discharge, Plaintiff has not shown that she was denied a meaningful opportunity to clear her name. As the Eleventh Circuit has expressly recognized, it is only "when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under 1331 arise . . . ." *Cotton v. Jackson*, 216 F.3d 1328, 1330-31 (2000) (per curiam) (quoting *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994)). Therefore, even assuming that some due process right has been violated, "[i]f adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived him of procedural due process." *Cotton*, 216 F.3d at 1331.

Here, Plaintiff was afforded ample opportunity to clear her name of any defamatory statements that may have originated as a result of her employment reviews. In fact, Plaintiff had two such opportunities. First, during the initial committee meeting of her third-year review, Plaintiff was allowed to be present, at which time she could respond to any

concerns and contest any inaccuracies that were made a part of her recommendation report. In addition to this personal appearance, she was allowed to supplement the committee's report with written objections to recommendations being presented to the senior faculty. Second, in response to the senior faculty's ultimate recommendation, Plaintiff was able to appeal the decision to a separate grievance panel and personally contest any inaccuracies upon which the senior faculty decision was based. During that hearing, Plaintiff, accompanied by an attorney was provided with the opportunity during this hearing to challenge openly attacks on her professional abilities or mental health. It is also clear that the panel considered her concerns regarding that separate personnel file, an issue that it discussed in its recommendation to reject the non-renewal vote. In light of these procedures, the Court finds that Plaintiff did receive a meaningful name-clearing opportunity.

## III. CONCLUSION

Plaintiff has failed to satisfy the stigma-plus element of a Fourteenth Amendment due process claim, and she has not demonstrated that she was denied any meaningful opportunity to clear her name and correct her employment record. In light of these findings, Plaintiff cannot demonstrate that she has suffered from the deprivation of a currently cognizable constitutional right, and Defendants Firestone, Nix and Squires are entitled to qualified immunity for Plaintiff's § 1983 due process claims under the Fourteenth Amendment. *See Hartley v. Parnell*, 193 F. 3d 1263, 1271 (11th Cir. 1999). Accordingly, Defendants' supplemental motion for summary judgment is hereby GRANTED.

SO ORDERED, this 19th day of November, 2002.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action No. 3:97-CV-95 (DF)

November 21, 2002

CAROL STAVROPOULOS,
PLAINTIFF,
V.
EVAN FIRESTONE, W. ROBERT NIX, WILLIAM SQUIRES AND BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
DEFENDANTS

**JUDGMENT**

The Court by Orders filed March 13, 2002 and November 20, 2002, having granted Defendant's Motions for Summary Judgment,

JUDGMENT is hereby entered in favor of Defendants. Plaintiff shall recover nothing from defendants. Defendants are also entitled to recover their costs of this action.

This November 21, 2002.

GREGORY J. LEONARD, CLERK

/s/ Zadie Peters
ZADIE PETERS
DEPUTY CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16486-II

FILED October 14, 2004

CAROL STAVROPOULOS,
PLAINTIFF-APPELLANT,

*v.*

EVAN FIRESTONE, W. ROBERT NIX, WILLIAM SQUIRES, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS DIVISION HEAD OF THE ART EDUCATION DEPARTMENT OF THE SCHOOL OF ART, BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
DEFENDANTS-APPELLEES.

On Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19_____, _____ F.2d _____ ).

Before: EDMONDSON, Chief Judge, DUBINA and COX, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal

Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. R. Cox
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8723

D.C. Docket No. 3:97-CV-95

April 2, 1999

CAROL STAVROPOULOS,
PLAINTIFF-APPELLANT,
*v.*
EVAN FIRESTONE, W. ROBERT NIX, ET AL, DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Middle District of Georgia
(April 2, 1999)

Before ANDERSON and BLACK, Circuit Judges, and FORRESTER,* District Judge.

PER CURIAM:

Plaintiff alleges that that the individual defendants retaliated against her on account of two instances of protected speech. The individual defendants filed a motion to dismiss, Fed. R. Civ. P. 12(b)(6), based on qualified immunity. This is

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* Honorable Owen J. Forrester, U.S. District Judge for the Northern District of Georgia, sitting by designation.

an appeal from the district court's non-final order denying the motion to dismiss.[1]

On appeal, Appellants challenge only the district court's conclusion that Plaintiff's allegations (with respect to the two instances of speech set forth in her complaint) embodied speech implicating a public concern under clearly established law.[2] With respect to the first instance of speech that Plaintiff contends is protected, the complaint and its attachments make clear that Plaintiff has alleged that she criticized the selection process for the hiring of a new teacher on the ground that there was gender discrimination in the process, and that she voiced these criticisms to the hiring committee itself, to the Director of Women's Studies, and to the Dean of the College of Arts and Sciences. Plaintiff's criticism centered on the hiring process involving an applicant other than herself, and the complaint does not otherwise suggest that the context of plaintiff's criticism involved any type of personal grievance. Given these allegations, the district court did not err in concluding that Plaintiff's allegations with respect to this speech implicated matters of public concern pursuant to clearly established law. *See Maples v. Martin*, 858 F.2d 1546, 1553 (11th Cir. 1988).

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[1] Such an order denying qualified immunity is immediately appealable. *See Mitchell v. Forsyth*, 472 U.S. 511, 527-529, 105 S.Ct. 2806, 2816-2817 (1985).

[2] Appellants make no argument under *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), that even if Plaintiff's speech was protected by the First Amendment, her interest in voicing such speech was outweighed by their interest in promoting workplace efficiency, thereby rendering the alleged retaliation not a violation of her clearly established right; accordingly, we decline to address that issue in this appeal. Also, appellants make no argument on appeal that we should view the complaint as pursuant to a heightened pleading standard; thus we evaluate the complaint pursuant to the usual standard of Fed. R. Civ. P. 8(a).

However, we conclude otherwise with respect to the second instance of speech alleged by Plaintiff. In Paragraph 17 of the complaint, Plaintiff alleges merely that Defendant Nix made false statements in retaliation for Plaintiff's sympathy and support for students who raised concerns about sexual harassment by Defendant Nix. Neither in Paragraph 17 nor elsewhere in the complaint or its attachments does Plaintiff allege any facts which would indicate the content of such speech, or its form or context – rendering a public concern analysis under *Connick v. Meyers*, 103 S.Ct. 1684, 1690 (1983), impossible to conduct. Without such allegations as to content, form, and context of this aspect of Plaintiff's speech, we cannot conclude that it constituted expression touching on a topic of concern as a matter of clearly established law.

Therefore, we affirm the district court's denial of the motion to dismiss with respect to the first instance of speech; however, with respect to the second instance, we reverse the district court's denial of the motion to dismiss. On remand, the district court in its discretion may permit plaintiff to amend under Fed. R. Civ. P. 15.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION
No. 3:97-GV-95(DF)

CAROL STAVROPOULOS,
PLAINTIFF,

V.

EVAN FIRESTONE, W. ROBERT NIX,
WILLIAM SQUIRES, AND THE BOARD
OF REGENTS OF THE UNIVERSITY
SYSTEM OF GEORGIA,
DEFENDANTS.

Opinion Filed May 12, 1998
Before Duross Fitzpatrick, District Judge

ORDER

The above styled case is a civil rights action in which the plaintiff, Carol Stavropoulos, claims that she was discriminated against on the basis of her sex and a perceived disability, and retaliated against because she had engaged in constitutionally protected speech. Plaintiff also alleges various state law claims. Now before the Court is a motion to dismiss on behalf of Defendants Evan Firestone, W. Robert Nix, and William Squires. For the reasons stated herein, Defendants' motion is granted in part and denied in part.

In deciding this motion to dismiss, the Court must follow the well established rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Parr v.*

*Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 889-90 (11th Cir. 1986) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1686-87, 40 L.Ed.2d 90 (1974) (citations omitted)). In assessing Defendants' motion, the Court must accept all allegations in the complaint as true. *Powell v. M.C. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990).

At all times relevant to this action, Plaintiff was employed by the Board of Regents of the University System of Georgia as an assistant professor of art education. In 1995, Defendant Evan Firestone, Director of the University of Georgia School of Art, requested that Plaintiff serve on a faculty search committee to select a candidate for a computer artist position. During the course of service on this committee, Plaintiff voiced opposition to the process employed by the committee in selecting the candidate who was ultimately appointed to the position. Plaintiff's criticism of the process centered on the failure of the committee to fairly consider a better qualified female candidate and failure to adhere to University of Georgia guidelines ensuring equal opportunity of employment.

After Plaintiff's service on the faculty search committee was completed, Plaintiff was denied recommendation for reappointment by the faculty for the 1996-97 school year. The Dean of the Franklin College of Arts and Sciences subsequently reversed Plaintiff's non-renewal. Thereafter, Defendant Firestone solicited negative information about Plaintiff, compiled an unauthorized personnel file and engaged in "other acts of retaliation against plaintiff."

In 1996, Defendant Firestone appointed a faculty committee to conduct a third year review of Plaintiffs record of teaching, research, and service. Defendant Firestone instructed the third year review committee to consider the adverse material Firestone had previously compiled in retaliation for Plaintiff's service on the computer artist search committee.

On May 22, 1996, Defendant Squires, as chairman of the third-year review committee, wrote a memorandum to the committee entitled, "Understanding the Role Played by Illness Relative to Carol Stavropoulos'[s] Performance of Her Duties as a Faculty Member." The memorandum contained references to pamphlets from the National Depressive and Manic Depressive Association. That memorandum suggested to the tenured faculty that they consider Plaintiffs appointment in light of Defendant Squires's perception that Plaintiff suffered from a "major mental disorder."

During faculty meetings, which were held in order to consider Plaintiff's application for early tenure and to consider renewal of Plaintiff's contract, Defendants Squires, Firestone, and Nix caused significant procedural irregularities which resulted in denial of Plaintiff's application for early tenure and a negative vote on renewal of Plaintiff's contract. On June 18, 1996, Plaintiff received a letter from Defendant Firestone notifying her of the non-renewal of her contract for the 1997-98 academic year.

Plaintiff also alleges in her complaint that Defendant Firestone depressed Plaintiff's pay raises and took "other actions adverse to plaintiff's employment in retaliation for plaintiff's exercise of her protected rights" and that "Defendants treated plaintiff less favorably than similarly situated male assistant professors on the basis of sex and perceived disability."

Plaintiff further contends that Defendant Nix made false and malicious reports concerning Plaintiff's job performance and his approval of Plaintiff holding a graduate seminar at her home (Defendant Nix expressly approved of Plaintiff's home as a meeting place and then falsely and maliciously denied having given his approval). Defendant Nix made these false statements in retaliation for Plaintiff's sympathy and support for students who raised concerns about sexual harassment by Defendant Nix. Plaintiff's actions in counseling students with complaints of sexual harassment were required by University

of Georgia policies. Defendant Nix also filed a malicious and baseless civil action in the Superior Court of Clarke County in retaliation for Plaintiff's protected actions.

**I. § 1983 CLAIMS**

In Count One of her complaint, Plaintiff alleges that "Defendants have violated plaintiff['s] constitutional rights to freedom of speech, due process of law, and equal protection of law."

**A. First Amendment Retaliation**

A government employer may not take adverse employment action against a public employee in retaliation for engaging in constitutionally protected speech. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). To be protected under the First Amendment, a public employee's speech must implicate matters of public concern. That is, the speech must relate to a matter of political, social, or other concern to the community. *Connick v. Meyers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). In making this determination, the court looks at the content, form, and context of the given statement. *Id.* First Amendment protection does not attach to speech that exposes, merely for personal benefit, a personal grievance. *Id.*; *Morgan v. Ford*, 6 F.3d 750, at 754-55 (11th Cir. 1993).

In her complaint, Plaintiff asserts two instances in which she engaged in protected speech: (1) Plaintiff "voiced opposition . . . [to] the failure of the [search] committee to fairly consider a better qualified female candidate and failure to adhere to University of Georgia guidelines ensuring equal opportunity of employment," and (2) Plaintiff's "sympathy and support for students who raised concerns about sexual harassment by Defendant Nix." *Plaintiff's Complaint*, ¶ 17. Defendants argue that these expressions involved personal grievances and complaints of internal, departmental conduct, which do not involve political, social, or other concern to the community.

*1. Opposition to Alleged Discrimination*

In a broad sense, Plaintiff's criticism of the faculty search committee's failure to adhere to University of Georgia equal employment opportunity guidelines and failure to consider a better qualified female candidate involved allegations of discrimination on the part of the faculty hiring committee of a public university. Speech aimed at identifying or eradicating official misconduct in a public institution has been held to qualify as speech involving a matter of public concern. *See, e.g., Davis v. Ector County*, 40 F.3d 777, 783 (5th Cir. 1994) ("reports of sexual harassment perpetrated on public employees is of serious public concern" since this information is "relevant to the public's evaluation of the performance of governmental agencies"); *Wilson v. UT Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992) (reports of sexual harassment perpetrated on the plaintiff and other women at the health center is of great public concern); *Marshall v. Allen*, 984 F.2d 787, 795 (7th Cir. 1993) (sex discrimination in a public agency is a topic of public concern); *Cooper v. Smith*, 855 F. Supp. 1276, 1280 (S.D. Ga. 1994) (deputy sheriff's conversations with state bureau of investigation concerning the alleged misconduct of an elected official were related to matters of public concern), *Clark v. City of Macon*, 860 F. Supp. 1545, 1553 (M.D. Ga. 1994) (city employee's speech concerning misuse and theft of city property was matter of public concern); *Moore v. Tri-City Hospital Authority*, 696 F. Supp. 1496, 1496 (N.D. Ga. 1988) (hospital chaplain's speech concerning religious and spiritual commitment of public hospital, availability of a chapel in the hospital, and convenience of the chaplain's office to the public who use the hospital was matter of public concern).

In a narrow sense, Plaintiff's speech involved an internal grievance about a departmental matter. Speech aimed at expressing a personal grievance, for personal benefit, is not protected. *See, e.g., Watkins v. Bowden*, 105 F.3d 1344 (11th Cir. 1997) (public employee's private and informal complaints about her colleagues' treatment of her was not

matter of public concern, in part because it did not "draw the public at large or its concerns into to picture" and such was made in her capacity as employee rather than as citizen); *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997) (employee's complaints about employer's discrimination on the basis of disability was not matter of public concern, because "it did not refer to any practice or course of conduct by the police department against disabled individuals beyond [the plaintiff] and [did] not seek redress beyond improving [the plaintiffs] personal employment situation"). In contrast to these cases, however, here, Plaintiff's speech involved allegations of discrimination against another individual, not against herself (Plaintiff was not claiming that *she* had been discriminated against). Thus, her speech "did not constitute an employee grievance motivated merely 'by her . . . rational self-interest in improving the conditions of her employment.'" *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1539 (11th Cir. 1994) (*quoting Morgan v. Ford*, 6 F.3d 750, 754-55 (11th Cir. 1993)). As such, it does not involve purely a personal grievance, the sort of speech which *Connick* sought to exclude from constitutional protection. 461 U.S. at 147-48; 103 S.Ct. at 1690-91.

Even though Plaintiff's speech did not directly impact the public, the Court finds that because it involved allegations of discriminatory practices by faculty members of a public university, it relates to a matter of concern to the public and is, therefore, constitutionally protected. *See Maples v. Martin*, 858 F.2d 1546, 1553 (11th Cir. 1998) (plaintiff's speech involving inadequate facilities, low faculty to student ratio, poor performance of graduates on licensing exam, ability of department to prepare students for professional careers, and status of accreditation "directly affected the public's perception of the quality of education in a given academic system," and thus involved a matter of public concern).

*2. Sympathy and Support for Alleged Victims of Sexual Harassment*

Likewise, Plaintiff's voicing sympathy and support for students who complained of sexual harassment by a faculty member does not involve a personal grievance, but rather, implicates system-wide discrimination. Thus, the Court finds that it involves a matter of public concern. *See Muller v. Fairfax County Sch. Bd.*, 878 F .2d 1578, 1582-83 (4th Cir. 1989) (public school teacher's letter in response to student's allegations of sexual discrimination in physical education classes was a matter of public concern); *Marshall v. Allen*, 984 F.2d 787, 795 (7th Cir. 1993) (permitting § 1983 claim when employee was discharged for supporting employees who had filed gender discrimination suit against employer).

*3. Qualified Immunity*

In addition to showing that her speech involved a matter of public concern, a critical element of Plaintiff's First Amendment retaliation claim is that such speech played a substantial part in Defendants' challenged employment decisions. *See Bryson v. City of Waycross*, 888 F.2d 1562, 1565-66 (11th Cir. 1989) (establishing four part test for First Amendment retaliation claims). If Plaintiff fails to establish this element, she will have failed to show any violation of her rights. Consequently, Defendants will be entitled to qualified immunity if "their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994).

Generally, there is no subjective component to qualified immunity analysis, and the test is based on objective reasonableness. *Id.* at 1150. However, where, as here, "subjective motive or intent is a critical element of the alleged constitutional violation[,] the intent of the government actor is relevant." *Walker v. Schwalbe*, 112 F .3d 1127, 1132-33 (11th Cir. 1997) ("government official's state of mind is critical element of First Amendment retaliation claims"). Therefore,

because Plaintiff's proof of Defendants' motivation in taking the challenged action against her is necessary to determine whether Plaintiff's constitutional rights were violated, the issue of whether Defendants are entitled to qualified immunity is not appropriate for determination on a motion to dismiss. Accordingly, Defendants' motion to dismiss on qualified immunity grounds is DENIED at this time, but the issue may be raised again on a motion for summary judgment.

**B. Due Process**

In her complaint, Plaintiff alleges that she was deprived of a property interest in her employment with the University and a liberty interest in her reputation, without due process of law.[1]

1. Property

To be accorded procedural due process protection for an alleged deprivation of property without due process, Plaintiff must first show that she has a property interest in her job. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Then, Plaintiff must show that she suffered a deprivation of her rights. Defendants argue that since Plaintiff was not a tenured professor, she does not have a constitutionally protected property interest in her employment. Plaintiff asserts that even though she was not a tenured professor, she had an employment contract with the University, which gave rise to her expectation of continued employment.

In *Perry v. Sinderman*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972), the Supreme Court recognized that, despite the lack of tenure or a formal contract, a teacher

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[1] In the Eleventh Circuit, only procedural due process claims are available to public employees who claim that adverse employment action was taken against them arbitrarily and capriciously. *McKinney v. Pate*, 20 F.3d 1550,1560 (11th Cir. 1994). Thus, to the extent that Plaintiff's complaint alleges a substantive due process claim, such claim is hereby DISMISSED.

may have a property interest in continued employment, arising from an implied contract based on rules and understanding with the employer or from the circumstances and facts of the service. Plaintiff, therefore, has sufficiently alleged a property interest in her employment to overcome Defendants' motion to dismiss on this ground.

Plaintiff has failed, however, to allege with particularity that she was denied such property right without being accorded due process, as is necessary under the Eleventh Circuit's heightened pleading requirement for civil rights actions. *See GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.2d 1359, 1367 (11th Cir. 1998). Plaintiff fails to allege in her complaint that she did not receive the process to which she was entitled. "[A] procedural due process violation is not complete 'unless and until the State fails to provide due process.' . . , [T]he state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (*quoting Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990)). Plaintiff does not allege with particularity any process to which she was due, which Defendants refused to provide. Therefore, although Plaintiff may have sufficiently alleged that she has a property right in her employment, she fails to state a claim for deprivation of that property right. Accordingly, Defendants' motion to dismiss this claim against them is GRANTED.

2. Liberty

To show that she was deprived of a liberty interest in reputation, Plaintiff must show that (1) a false allegation was made, (2) to the public, (3) about a public employee, (4) by a governmental employer, (5) that was stigmatizing, and (6) made without an opportunity for the employee to clear her name. *Buxton v. City of Plant City*, 871 F .2d 1037, 1042-43

(11th Cir. 1989); *Smith v. Upson County*, 859 F. Supp. 1504, 1513-14 (M.D. Ga. 1994), *aff'd*, 56 F.3d 1392 (11th Cir. 1995). Plaintiff alleges in paragraphs ten and eleven of her complaint that Defendants deprived her of her liberty interest in her reputation by "assembl[ing] an unauthorized personnel file" containing "negative information about the plaintiff" and then "instruct[ing] the third year review committee to consider the adverse material." Even though Plaintiff makes no allegation in her complaint that information about her was disseminated to the public by Defendants, placement of false allegations in one's personnel file may constitute sufficient publication for purposes of claimed liberty interest. *See Buxton*, 871 F.2d at 1045. However, Plaintiff makes no allegation that the information contained in the personnel file assembled by Defendants was false, as is required under *Buxton*. *Id.* at 1042-43. Furthermore, as discussed above, Plaintiff fails to allege that Defendants refused to provide her any process to which she was entitled. Accordingly, she fails to establish a claim of deprivation of a liberty interest without due process, and Defendants' motion to dismiss this claim against them is GRANTED.

C. Equal Protection

To establish an equal protection claim, a plaintiff must show that the defendant purposefully treated the plaintiff differently from other similarly situated individuals. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *E&T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987).

Here, under the Eleventh Circuit's heightened pleading requirement, Plaintiff must allege particular facts establishing a claim of unequal treatment and discriminatory motive by Defendants. *GJR Investments*, 132 F.2d at 1367. In paragraph fifteen of her complaint, Plaintiff merely alleges that "Defendants treated [her] less favorably than similarly situated assistant male professors on the basis of sex and perceived disability.'" Plaintiff does not present a single

example of a male or non-disabled professor who was similarly situated who was treated differently than Plaintiff. "Bare allegations that 'other' [individuals], even 'all other' [individuals], were treated differently do not state an equal protection claim; a complaint must attempt to show in some fashion that these 'other' [individuals] were situated similarly to the plaintiff." *Id.* Plaintiff's factual allegations, therefore, are not sufficiently specific and particular to satisfy this Circuit's high standard. Accordingly, Defendant's motion to dismiss this claim is GRANTED.[2]

**II. TITLE VII, TITLE IX and ADA**

Plaintiff has brought claims under Title VII, Title IX, and the ADA against Firestone, Squires, and Nix, as well as the Board of Regents, in Counts Two, Three, and Four of her complaint, respectively.

Defendants Firestone, Squires, and Nix argue that, as individuals, they cannot be sued under these statutes. Defendants are correct in asserting that "[i]ndividual capacity suits under Title VII are . . . inappropriate. The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act." *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); *see also Cross v. State of Alabama*, 49 F .3d 1490, 1504 (11th Cir. 1995) (individual capacity suits cannot be brought under Title VII). Likewise, neither the ADA nor Title IX provide for individual employee liability. *See Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996) (the ADA "does not provide for individual liability, only employer liability."); *Does v. Covington Co. Sch. Bd. Of Ed.*, 930 F. Supp. 554, 566 (M.D. Ala. 1996) (Title IX actions may be brought against educational institution only, not an

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[2] To the extent that Plaintiff asserts an equal protection claim for retaliation, no such right exists under the equal protection clause. *Ratliff v. Dekalb County*, 62 F.3d 338, 340 (11th Cir. 1995).

individual). Thus, to the extent that Plaintiff is suing Defendants Firestone, Squires, and Nix under Title VII, Title IX, and the ADA in their unofficial capacities. Plaintiff's claims are hereby DISMISSED.

Plaintiff is also purportedly suing Defendants Firestone, Squires, and Nix under Title VII, Title IX, and the ADA in their official capacities, as well as the Board of Regents. In *Busby*, the Eleventh Circuit stated, "We think the proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly." 931 F.2d at 772. While Plaintiff's claims against Firestone, Squires, Nix in addition to the Board of Regents may be redundant, the Court does not find that the inclusion of the individual defendants in their official capacities is improper or that it will be confusing to a jury. Accordingly, to the extent that Plaintiff is suing Defendants Firestone, Squires, and Nix under Title VII, Title IX, and the ADA in their official capacities, Defendant's motion to dismiss them as defendants is hereby DENIED.

**III. STATE CLAIMS**

Plaintiff also asserts state law claims against Defendant Nix for intentional infliction of emotional distress and interference with Plaintiffs right to contract. Defendant Nix argues that he is immune from liability under the Georgia Tort Claims Act, which expressly prohibits suits against individual state employees acting within the scope of their employment. O.C.G.A. § 50-21-25(b). Plaintiff argues that she is suing Nix individually, not as a state employee, and that Nix was not acting within the scope of his employment when he engaged in the challenged conduct. However, the Georgia Court of Appeals recently rejected this very argument in *Howard v. Miller*, 222 Ga. App. 868, 870, 476 S.E.2d 636, 638 (1996) (rejecting Plaintiff's argument that he sued the defendants as individuals and that therefore the state tort claims act giving immunity to state employees did not

apply to his suit). *See also* O.C.G.A. § 50-21-25(a) ("[the Georgia Tort Claims Act] constitutes the exclusive remedy for any tort committed by a state officer or employee.").

Under the Georgia Tort Claims Act, not only is Nix immune from liability from the acts about which Plaintiff complains, but Plaintiff's claims must also fail because she failed to give ante litem notice. Accordingly, Defendants' motion to dismiss Plaintiff's state law claims against Nix is hereby GRANTED.

## CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART.

1. Defendants' motion to dismiss Plaintiff's First Amendment retaliation claim is hereby DENIED.
2. Defendants' motion to dismiss Plaintiff's Due Process claim (based on property and liberty interests) is GRANTED. Accordingly, Plaintiffs Due Process claim is hereby DISMISSED WITHOUT PREJUDICE.
3. Defendants' motion to dismiss Plaintiff's Equal Protection claim is GRANTED. Accordingly, Plaintiff's Equal Protection claim is hereby DISMISSED WITHOUT PREJUDICE.
4. Defendants' motion to dismiss Plaintiffs Title VII, Title IX, and ADA claims against Defendants in their individual capacities is hereby GRANTED. but with respect to such claims against Defendants in their official capacities. Defendants' motion is DENIED.
5. Defendants' motion to dismiss Plaintiff's state law claims against Defendant Nix is hereby GRANTED.

SO ORDERED, this 12 day of May, 1998.

DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

## RELEVANT STATUTORY PROVISIONS

42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an

unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(2)

Supreme Court, U.S.
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No. 04-1099

In The
# Supreme Court of the United States

CAROL STAVROPOULOS,

*Petitioner,*

v.

EVAN FIRESTONE, *ET AL.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

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## QUESTIONS PRESENTED

1.

Whether the current case law across the various circuits is consistent with this Court's previous decisions and provides the necessary flexibility to address claims of "adverse employment actions" under the facts of individual cases?

2.

Whether any action identified by Petitioner rises to the level of adverse employment action in analysis of a First Amendment retaliation claim under 42 U.S.C. § 1983 or under Title VII?

3.

Whether lowering the standard for what constitutes adverse employment action would effectively eviscerate the defense of qualified immunity, as virtually all government decisions and actions could be adverse actions under "clearly established" law?

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## BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS

Respondents adopt and incorporate by reference herein the following portions of the Petition for a Writ of Certiorari: Parties to the Proceedings Below, Opinions Below, Statement of Jurisdiction, and Relevant Statutory Provisions.

## STATEMENT OF THE CASE

While the opinion of the court below adequately relates the facts involved in this matter, the Respondents believe that it would be beneficial to further elaborate on those facts to demonstrate that the Petitioner suffered no adverse employment action which could serve as a basis for her claims.

### Petitioner's employment at UGA, 1993-94

Petitioner was employed by Respondent Board of Regents as an assistant professor in the University of Georgia's School of Art beginning the 1993-94 academic year. (Pet. App. 2a). The director of the School of Art at the time was Respondent Firestone. *Id.* Petitioner was assigned to teach in the art education area, whose chairperson at the time was Respondent Nix. Respondent Squires was a peer-level faculty member with Petitioner. (Resp. Firestone, *et al.*, C.A. Br. 3).

Tenure-track faculty members at UGA who have not attained tenure are employed pursuant to one-year annual contracts, and each year the senior faculty vote on

whether to offer a new contract for the next academic year. (Pet. App. 2a).

Petitioner experienced depression and anxiety for a number of years, beginning during her first year in Athens (1993-94), before the occurrence of any of the events about which she complained in this lawsuit. (Record 100: 23-28). Her problems with depression began when she "had a marital situation." (Record 100: 26). She has been treated over the years with Zoloft, Diazepam, Wellbutrin, Prozac, Ambien and Klonopin. (Record 100: 23-28). During the spring quarter of 1997, Petitioner took medical leave because of migraine headaches, and she then became addicted to narcotics. (Record 100: 75-81, 114-115; Record 119: 16-19).

**The computer art search, 1994-95**

As noted below, during the 1994-95 academic year, Dr. Firestone appointed Petitioner and five others to serve on a search committee charged with conducting a national search to hire a computer artist. (Pet. App. 2a). Petitioner ultimately disagreed with how she thought that search committee operated and the conclusion it reached. *Id.*

After the search committee voted to hire a candidate different from the one Petitioner desired, Petitioner "had a tantrum." (Resp. Firestone, *et al.*, C.A. Br. 4). According to committee member Ed Lambert, she was "extremely, extremely upset." [ . . . She] "physically got up from the desk and was shaking her fists at us. . . . She was very violent. [She was] right in your face yelling." (Record 123: 23-24). According to committee member Lanny Webb, Petitioner became very upset and hysterical. He "remember[s] papers were in the air and her voice was raised. She

was very upset. . . ." Webb testified, "I was very disappointed that Dr. Stavropoulos had used her position . . . to retaliate against another colleague [Kaufman] who (sic) she had a disagreement with." She questioned the honesty and integrity of the committee members who voted for Kaufman. (Record 129: 17-19; Record 129 ex. 2; Pet. App. 2a).

Notwithstanding the Petitioner's position, as outlined in a minority opinion report prepared by a colleague, Petitioner did not say anything of substance to the full faculty, nor did she speak during a meeting with the Associate Dean of the College of Arts and Sciences, to discuss the computer art hiring process. (Resp. Firestone, *et al.*, C.A. Br. 4).

Subsequently, Respondent Firestone issued a memorandum dated March 27, 1995, to Petitioner and her colleague, stating in its entirety,

> In regard to your March 24, 1995 memo [the "minority report" to Dean Anderson, Record 111 ex. 16], please recognize that search committee recommendations are advisory to the faculty. The faculty can accept or reject the recommendation(s) of the committee. In the case of the computer art position, the faculty subscribed to the search committee's majority recommendation (four of six members).
>
> Insofar as the search and vote for appointment followed The University of Georgia's Guidelines for Appointment, Promotion, and Tenure and Dean Anderson's "Guidelines for Recruitment of Tenure-Track Faculty," I am surprised that you intend to press a minority position that is advisory to begin with.

> You should realize that your intended involvement in the appointment process at this point is unprecedented in the School of Art. However, it is your prerogative to meet with the Dean or one of his staff (Associate Dean John Morrow oversaw this search), to which I have no objection.

(Pet. App. 3a; Record 111 ex. 17). The memorandum was copied to the Dean and the Associate Dean of the School of Art. *Id.* After investigating the matter, the Dean's office ultimately deferred to the School of Art and approved the hiring of Kaufman. (Resp. Board of Regents C.A. Br. 6).

After the computer art search, according to Petitioner, she "noticed [her] art education colleagues were treating [her] differently. Nothing [she] could put [her] finger on, just a little more distance." (Record 100: 51-52).

**1995 uneffectuated nonrenewal vote for 1996-97**

In the spring of 1995, the senior faculty of the School of Art voted not to renew Petitioner's employment contract for the 1996-97 academic year because of the faculty's perception that Petitioner refused to behave professionally or to have collegial relationships with her colleagues. (Pet. App. 3a, Resp. Board of Regents C.A. Br. 6-7). Petitioner had questioned the honesty and integrity of her colleagues on the computer art search committee and had often alienated her colleagues in other ways such as concluding a departmental retreat by verbally attacking them; referring in a hostile manner to "an 800 or 900 pound gorilla in Art Education;" reading a lengthy poem at a faculty meeting criticizing her colleagues; and provoking a loud argument with a colleague in the hall. (Resp. Firestone, *et al.*, C.A. Br. 5.) Many of her colleagues and

students (both male and female) memorialized the reasons for their votes against and/or problems with Petitioner in subsequent letters to Dr. Firestone. (Resp. Firestone, *et al.*, C.A. Br. 5-6) (referred to by Petitioner as the "separate personnel file," Petition 14).

Despite the nonrenewal vote, Petitioner received a new contract for 1996-97, and continued her employment at the art school during the 1996-97 academic year, except for the entire spring quarter, during which she took medical leave. (Pet. App. 4a; Record 100: 75-81, 114-115). The Dean and the Associate Dean had informed Firestone and the School of Art that they could not support the non-renewal vote for procedural reasons, because they could not find sufficient evidence in the file to support the faculty's negative vote and they felt the faculty had not sufficiently discussed the matter prior to the vote. (Pet. App. 4a).

**Petitioner's third-year review**

At the end of a faculty member's third year at the University of Georgia, her colleagues conduct a third-year review to assess the progress she has made toward earning tenure. (Pet. App. 4a; *see also* Pet. App. 4a n. 1). Because of Petitioner's concerns about the process, she began to work closely in this regard with Dr. Hugh Ruppersburg, the new Associate Dean of the School of Art. (Record 100: 91).

Dean Ruppersburg offered written assurance to Petitioner that a file of letters gathered by Respondent Firestone the previous summer to support the 1995 nonrenewal decision would not be considered by the third-year review committee; that she would have the opportunity to respond to the third-year review committee's report

in accordance with the University's *Guidelines for Appointment, Promotion, and Tenure*; and that Firestone had been instructed to make sure the third-year committee would conduct itself accordingly. (Record 100: 90 exs. 1, 2). Petitioner found the selection of the committee members, three of the four of whom were women, to be acceptable. (Resp. Firestone, *et al.*, C.A. Br. 7; Record 100: 101).

During the third-year review process, some of the members asked Petitioner about her medications and her mental health. (Pet. App. 5a, 6a; Record 100: 93-96). Respondent Squires explained in a memorandum the role he felt that illness had played in the problems Petitioner had had in the School of Art. (Resp. Board of Regents C.A. Br. 11). Dr. Squires testified that his intent in creating the memo was to help Petitioner by explaining possible reasons for her non-collegial behavior. *Id.*

**1996 ineffective nonrenewal vote for 1997-98**

The third-year review committee presented its report to a meeting of the faculty, at which the senior faculty were to vote on whether to offer an employment contract to Petitioner for the 1997-98 academic year. (Pet. App. 5a; Resp. Board of Regents C.A. Br. 11-12, 13-14). The five-page committee report concluded: "The committee agreed that Dr. Stavropoulos is making good progress toward achieving promotion and tenure in the area of research. However, persistent and ongoing problems in the areas of teaching and service are jeopardizing Dr. Stavropoulos' progress towards promotion and tenure." (Pet. App. 5a-6a; Record 100 ex. 3).

The senior faculty voted not to offer Petitioner a contract for 1997-98 due to "[r]epeated instances of unfortunate or

unprofessional behavior involving both students and faculty [which] caused both to feel threatened and impugned by Dr. Stavropoulos." The third-year review committee had noted that "public expressions of anger, shouting, as well as berating and belittling colleagues has created a difficult working environment." (Pet. App. 5a-6a; Resp. Board of Regents C.A. Br. 12-14; Record 100 ex. 3). The committee had also cited Petitioner's holding numerous classes in her home rather than on campus and her assigning "all 'A' grades (30+ students) for one full calendar year (1995)," which called "into question positive student course evaluations." Also noted were Petitioner's "inability to deal constructively with criticism from students and colleagues," as well as her resistance to learning and following procedures, both of which resulted in inaccurate guidance and advice to students. *Id.*

**Petitioner's grievance to Faculty Senate regarding the 1996 nonrenewal vote**

The 1996 nonrenewal vote was reversed by the College of Arts and Sciences' Faculty Senate Grievance Panel pursuant to Petitioner's formal grievance, as provided for in the University policies and procedures for the College of Arts and Sciences (Record 132 ex. BB), before the 1997-98 academic year commenced. (Pet. App. 6a; Resp. Board of Regent C.A. Br. 12). An evidentiary hearing was conducted, and Petitioner hired an attorney for her representation at it. (Record 100: 107-110 ex. 4). Despite the problems identified in the third-year committee's report, Petitioner received a contract for the 1997-98 academic year prior to the beginning of school. Petitioner was employed for the 1997-98 academic year with no loss of salary. (Pet. App. 6a; Resp. Board of Regents C.A. Br. 12).

**Proceedings Below**

Petitioner Carol Stavropoulos filed her Complaint in the Middle District of Georgia, Athens Division, on October 20, 1997. She asserted claims against the Board of Regents and three individual colleagues in the University of Georgia School of Art under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; and 42 U.S.C. § 1983 for alleged violation of free speech, among other grounds. (Pet. App. 1a). The Court of Appeals for the Eleventh Circuit affirmed the Orders of the district court granting summary judgment on the Title VII retaliation claims against individual Respondents Firestone, Squires and Nix, in their official capacities, and Respondent Board of Regents; and granting summary judgment to the individuals on Petitioner's claims of retaliation under Title VII and under 42 U.S.C. § 1983 for violation of her First Amendment right to free speech. (Pet. App. 18a).

## REASONS FOR DENYING THE WRIT

### I. Current case law across the various circuits is consistent with this Court's previous decisions and provides the necessary flexibility to address claims of "adverse employment actions" under the facts of individual cases.

This Court's decision in *Rutan v. Republican Party*, 497 U.S. 62 (1990), clarified in necessarily broad terms the standard for what kinds of employer conduct are actionable in a First Amendment retaliation case brought under

42 U.S.C. § 1983.[1] *Rutan* established that adverse employment action is not limited to terminations, but "extends to promotion, transfer, recall [after layoff], and hiring decisions based on party affiliation and support. . . ." 497 U.S. at 79. The Court noted that requiring the adverse employment action to be equivalent to a dismissal was unduly restrictive because it failed to recognize that there were deprivations less harsh than dismissal that pressured state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. *Rutan*, 497 U.S. at 75; *see Elrod v. Burns*, 427 U.S. 347, 356-357 (1976). This Court's holding in *Rutan* was followed by the Eleventh Circuit below and is consistent with what Petitioner refers to as the "majority rule" of Circuits 1, 3, 4, 6, 7, 9, 10 and D.C., and the "minority rule" of Circuits 5, 8 and 11.

The current "majority rule," as characterized by the Petitioner, is articulated in *Cole v. Me. Sch. Admin. Dist. No. 1*, 350 F. Supp. 2d 143, 152 (D. Me. 2004), as the "reasonably likely to deter" test: "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity[]" (citing *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000)).[2]

The current "minority rule" was set forth by the Eleventh Circuit below in the case *sub judice* as follows:

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[1] Although the Petition refers to "actionable retaliation" in § 1983 cases, the specific issues before the Court are whether any employer conduct towards Petitioner satisfies the retaliatory adverse employment action requirements of a 42 U.S.C. § 1983 prima facie case under the First Amendment, and a Title VII prima facie case. The two claims are treated together in this Brief.

[2] *Cole*, 350 F.Supp. 2d at 152 n. 13.

> A public employer retaliates when he takes an adverse employment action that is likely to chill the exercise of constitutionally protected speech.
>
> [. . .]
>
> While it is true that a claimant must show a chilling effect on her protected speech, she must also show that this effect resulted from an adverse employment action. To be considered an adverse employment action in a First Amendment retaliation case, the complained-of action must involve an important condition of employment.

Pet. App. 12a, 13a (citations omitted).

As recognized by the Eleventh Circuit, this Court's holding in *Rutan*, however, does not mean that *any* employer conduct likely to chill an employee's exercise of constitutionally protected speech is actionable, nor does it impose an unnecessarily high standard for showing adverse action. Instead, the standard imposed by *Rutan* is fact-specific, flexible and appropriate to First Amendment employment cases, which place special focus on the relationship between governmental employer and employee and their regular interactions and communications.[3] Employment cases take form in an arena from which both parties draw important and distinct benefits, both material and intangible. To omit the "employment" aspect from

---

[3] The three examples of what does and does not constitute adverse employment action in the section of the EEOC Compliance Manual cited in the Petition illustrate the significance of the relationship between employer and employee and the culture of the workplace in the "adverse employment action" analysis. *U.S. Equal Employment Opportunity Comm'n Compliance Manual*, § 8 at 14 (May 1998).

the adverse employment action requirement, reducing it to any action by a public employer that has some chilling effect on protected speech ignores the realities of the workplace, its opportunities and its pitfalls.

The flexible standard of *Rutan*, applied by all judicial Circuits, accommodates the myriad situations and circumstances that may or may not constitute adverse employment action. This flexible standard does not represent a split in the determinations of the various circuit courts of appeals, but, as recognized by the Third Circuit in *Brennan v. Norton*, 350 F.3d 399, 419 (3d Cir. 2003):

> "Determining whether a plaintiff's First Amendment rights were adversely affected by retaliatory conduct is a fact intensive inquiry focusing on the status of the speaker, the status of the retaliator, the relationship between the speaker and the retaliator, *and the nature of the retaliatory acts." Suarez Corp. Industries v. McGraw,* 202 F.3d 676, 686 (4th Cir. 2000) (emphasis added). Consequently, "to properly balance these interests, courts have required that the nature of the retaliatory acts committed by a public employer be more than *de minimis* or trivial." *Id.* A public employer "adversely affects an employee's First Amendment rights when it refuses to rehire an employee because of the exercise of those rights or when it makes decisions, which relate to promotion, transfer, recall and hiring, based on the exercise of an employee's First Amendment rights." *Id.* (Citations and internal quotations omitted). "On the other hand, courts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts

> were criticism, false accusations, or verbal reprimands." *Id.* (citations omitted).

*Brennan,* 350 F.3d at 419. The Third Circuit's decision highlights the harmony between the various circuits by acknowledging the variety of circumstances to which the standard for adverse employment action properly applies. The scope of application of the *Rutan* standard in all circuits attests to its flexibility, which should be maintained by denying certiorari in the case *sub judice*.

Determination of what constitutes adverse employment action under First Amendment retaliation and Title VII retaliation analyses must occur on a case-by-case basis in all but the most obvious cases. A ruling from this Court that adverse employer actions are to include any or every transfer, minor disciplinary action, memorandum and other correspondence, investigation and administrative decision, even if it was never effectuated, would be a disservice to Circuit and District Courts across the country, which are regularly presented fact patterns involving innumerable complexities of the collective American workplace, and in which the exercise of judicial discretion is both necessary and appropriate. A strictly uniform approach to what constitutes adverse employment action for purposes of First Amendment and Title VII analysis is inappropriate and unnecessary. Where factors such as factually nuanced circumstances, workplace culture, personalities and intent are involved, "one-size-fits-all" does not fit. "The definition of adverse action is not static across contexts[,]" *Suarez Corp. Indus. v. McGraw,* 202 F.3d at 686 (citing *Thaddeus-X v. Blatter*, 175 F.3d 379, 398 (6th Cir. 1999)), nor should it be.

## II. No action identified by Petitioner rises to the level of adverse employment action in analysis of a First Amendment retaliation claim under 42 U.S.C. § 1983 or under Title VII.

Petitioner argues that five employer actions were retaliatory adverse employment actions which can serve as the basis of her claims. As demonstrated correctly by the opinion below, none of the five accounts of alleged adverse action constitutes a retaliatory adverse action under even the most liberal interpretation of the *Rutan* standard.

The first employer action is Dr. Firestone's "letter" to colleagues Bradley Tindall and Petitioner in response to previous correspondence from them notifying the administration that they were filing a "minority report" concerning the computer art search. (Record 111 exs. 16, 17). Dr. Firestone's memorandum addresses only the procedural irregularity of hiring committee members communicating up the chain of command after their advisory role was fulfilled. (Record 111 ex. 17). It is simply a factual communication from supervisor to employee. There is no objective chilling effect on further expressions of protected speech. *See Phillips v. Bowen*, 276 F.3d 103, 109 (2d Cir. 2002).

Characterization of the memorandum by Petitioner as being retaliatory adverse employment action renders virtually any written guidance, advice or transfer of information from supervisor to employee actionable. *See Suarez Corp.*, 202 F.3d at 687. That clearly is not a standard embraced by this Court or any of the various circuits.

The second alleged retaliatory adverse employment action is what Petitioner labels the "internal investigation" conducted by Dr. Firestone to support the 1995 vote not to renew Petitioner's annual contract for the 1996-97

academic year. Because Respondents never notified Petitioner of the nonrenewal, and the nonrenewal was never put into effect, the "investigation" in itself was not related to anything even resembling an adverse action. *See Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004) (holding investigation, together with ultimate denial of paid sick leave, subject to review as adverse action.)

The third alleged retaliatory adverse employment action was Dr. Squires's "false accusations" of mental illness. The Ninth Circuit Court of Appeals has recognized false accusations to be actionable under 42 U.S.C. § 1983 only when in combination with more substantial adverse action and causally linked to protected speech. *See Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004) (holding that false accusations and other wrongful, concerted conduct intended to institute an unfounded criminal charge, were sufficient to state a claim under § 1983 for violation of his First Amendment rights); *Coszalter v. City of Salem*, 320 F.3d 968, 976-977 (9th Cir. 2003) (applying the "reasonably likely to deter [protected speech]" test to hold that a reprimand containing a false allegation, taken together with a criminal investigation, repeated and ongoing harassment and humiliation, a ten-day suspension from work, and other employer actions were adverse employment actions).

Other Courts of Appeals hold that employer speech such as false accusations are only actionable when they include "a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow." *Suarez Corp.*, 202 F.3d at 687. Otherwise, "such speech does not adversely affect a citizen's First Amendment rights, even if defamatory." *Id.*; *see* 202 F.3d at 687-688 for additional citations and quotations in

accord); *Benningfield v. City of Houston*, 157 F.3d 369, 376-377 (5th Cir. 1998) (holding that employees "falsely accused" of criminal wrongdoing and "verbally reprimanded" by their employer failed to allege adverse employment actions sufficient to constitute retaliation), *cert. denied*, 526 U.S. 1065 (1999) (cited in *Suarez Corp.*, 202 F.3d at 686); *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998) ("It would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation.")

The fourth alleged, retaliatory adverse employment action was Petitioner's performance evaluation for calendar year 1995 in which Petitioner scored 3.6 out of 5.0. (Record 121: 134 ex. 11). As Firestone was Petitioner's immediate supervisor,[4] this written review of job performance was but another instance of day-to-day personnel management in an employment setting, not an "adverse employment action." The Annual Faculty Evaluation of Petitioner was performed in accordance with the same standards used to evaluate other School of Art faculty, including "Professional Service and University Governance." Respondent Firestone was merely fulfilling his duties as Art School Director and not demonstrating any retaliatory animus necessary to transform this routine managerial function into an adverse employment action.[5]

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[4] Firestone's initial scoring of Petitioner's performance, including the written comments, was made with input from a four-member committee of three men and one woman. (Record 121: 134 ex. 11).

[5] Firestone testified, "[Petitioner's] continued [ . . . ] questioning of the faculty [hiring] process is alienating faculty. At that point, I never heard anything about gender discrimination. All I heard was that the best candidate by far had not been selected. . . . I asked her to be aware

(Continued on following page)

The fifth alleged retaliatory adverse employment action was the 1996 vote of the senior faculty not to renew Petitioner's employment contract for the 1997-98 academic year. This vote was reversed by a grievance committee of the Faculty Senate, pursuant to Plaintiff's formal grievance, as provided for in the University policies and procedures for the College of Arts and Sciences (Record 132 ex. BB; *see* Pet. C.A. Br. 29), before the 1997-98 academic year commenced. (Record 100: 101-02, 105-107). Petitioner's successful appeal of that decision does not transform the faculty vote, reversed and remedied by Respondents' own procedures, into an adverse employment action. *See DeGuiseppe v. Palermo*, 68 F.3d 187, 191 (7th Cir. 1995) (holding exercise of plaintiff's own volition in ending his police career rendered termination not actionable).

Petitioner argues that the attorney's fees expended to appeal the nonrenewal of her employment contract for the 1997-98 academic year renders her successful appeal an adverse employment action and "actionable retaliation." This argument transposes cause and effect, confuses a damages issue with the more fundamental one of adverse employment action, and introduces the employee's own volition into the standard of what constitutes "adverse employment action." *See Speigla v. Hull*, 371 F.3d 928, 941, n.6 (7th Cir. 2004) (rejecting the plaintiff's contention that the pay cut she received after voluntarily applying for and being assigned to a new position is evidence of adverse action, despite her feelings that she was "forced" to do it).

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that her persistence [ . . . ] was not responsive to a collegial process arrived at by consensus. . . ." (Record 121: 140-141).

Even when viewed in the aggregate, the five employer actions discussed in the Petition do not constitute adverse employment action. The standard for adverse employment action in the Second Circuit, as articulated in *Phillips v. Bowen,* 276 F.3d 103, 109 (2d Cir. 2002), requires an objective assessment of whether "the total circumstances of an employee's working environment changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, work place." *Id.* With objective consideration of even the cumulative impact on Petitioner of Dr. Firestone's memorandum to Tindall and Petitioner of March 27, 1995, the "internal investigation," the "false accusations," the performance evaluation for 1995, and the 1996 nonrenewal vote, in light of Petitioner's own exacerbation of the problems of her workplace environment, the employer actions fail to meet the standard applied in *Phillips.*

## III. Lowering the standard for what constitutes adverse employment action would effectively eviscerate the defense of qualified immunity, as virtually all government decisions and actions could be adverse actions under "clearly established" law.

Individual Respondents such as those in the instant case, as government officials performing discretionary functions, are generally granted qualified immunity and thus "'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald,* 457 U.S. [800,] 818 [1982]." *Wilson v. Layne,* 526 U.S. 603, 615 (1999); *see Anderson v. Creighton,* 483 U.S. 635, 639 (1987) (citing

*Harlow*, 457 U.S. at 819); *see also Graham v. Connor*, 490 U.S. 386, 397 (1986). "The central purpose of qualified immunity is to protect public officials 'from undue interference with their duties and from potentially disabling threats of liability.' *Elder v. Holloway*, 510 U.S. 510, 514 [. . .] (1994) (quoting *Harlow*, 457 U.S. at 806)." *Snyder v. Nolen*, 380 F.3d 279, 289 (7th Cir. 2004).

A determination of entitlement to qualified immunity involves determining whether the facts alleged show that Respondents violated a constitutional right, and whether that right was clearly established at the time of the violation. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001) The clearly established inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* "'The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 202 (quoting *Anderson*, 483 U.S. at 640).

Should the current fact-specific, flexible standard for retaliatory adverse employment action under 42 U.S.C. § 1983 be lowered to include the employer actions discussed in the Petition, government actors would be hobbled, as exercise of virtually any aspect of their authority and fulfillment of virtually any duty assigned them would be an adverse action under "clearly established" law. "The definition of adverse action is not static across contexts." *Thaddeus-X v. Blatter*, 175 F.3d at 398. Instead, it has the capacity to accommodate, whether inclusively or exclusively, the variety of fact patterns presented by public employment. Petitioner's position eviscerates the defense of qualified immunity and has potential to expose government employers to undue interference with their performance of their duties, threats of liability, as well as the

demands of litigation. *See Snyder*, 380 F.3d at 289 (citations omitted).

## CONCLUSION

The current standard for adverse employment action in the analyses of § 1983 First Amendment claims and Title VII retaliation claims, is very much workable, as demonstrated by its application by all the judicial circuits. For this and all foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

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Carol Stavropolous,

*Petitioner*,

v.

Evan Firestone et al.

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

The Eleventh Circuit rejected petitioner's First Amendment and Title VII retaliation claims in this case because they did not arise from an "adverse employment action" under that circuit's narrow definition of that term. Pet. App. 12a, 16a-17a. As described in the petition for certiorari and discussed in more detail below, that legal rule is consistent with the law of a handful of circuits, but contrary to the law of many others, a split of authority that has been widely acknowledged by the courts of appeals themselves. See, *e.g.*, *Ray* v. *Henderson*, 217 F.3d 1234, 1241-1242 (CA9 2000) (discussing Title VII split); Pet. App. 14a n.8 (Eleventh Circuit noting split on First Amendment standard).

Respondents do not contest that the questions presented by this petition are recurring and important. See Pet. 17-19. Instead, respondents argue only that the courts of appeals are wrong in the repeated recognition of the conflicts, and that, in any event, a "strictly uniform approach to what constitutes an adverse employment action for purposes of the First Amendment and Title VII analysis is inappropriate and unnecessary." BIO 12. Respondents are wrong on both counts. While respondents decline to even distinguish the two questions presented, see *id.* at 9 & n.1, petitioner has established that there are separate, but equally deep and mature circuit splits over what constitutes actionable retaliation under the First Amendment, Pet. 6-10, and under Title VII's retaliation provision, Pet. 25-27.

The continuation of that division, and the resulting disparity in protections afforded government workers in different circuits, is unnecessary and intolerable. Whistleblowers at the Centers for Disease Control in Atlanta should enjoy the same protections from retaliation as those stationed at the Department of Health and Human Services headquarters in the District of Columbia. But that equality of protection has been lacking for many years, and will continue

until this Court resolves the widely varying standards applied in the lower courts.

## I. Certiorari Should Be Granted To Resolve The Circuit Conflict Over What Acts Of Retaliation Are Actionable Under The First Amendment.

Contrary to respondents' assertion, the decision below is not consistent with a supposed uniform "flexible standard * * * applied by all judicial Circuits" to determine whether an act of retaliation is cognizable under the First Amendment. BIO 11.

As set forth in the petition, see Pet. 9-10, the majority of courts outside the Eleventh Circuit *do* apply a flexible standard, but that standard (in conflict with the Eleventh Circuit's rule) turns on whether "the actions taken by the defendants were reasonably likely to deter [the employee] from engaging in protected activity under the First Amendment." *Coszalter* v. *Salem*, 320 F.3d 968, 976 (CA9 2003) (internal punctuation omitted).[1] Under this view, "even

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[1] See also *Rivera-Jimenez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004) (relying on majority rule); *Suppan* v. *Dadonna*, 203 F.3d 228, 235 (CA3 2000) (test is whether "the alleged retaliatory conduct was sufficient 'to deter a person of ordinary firmness' from exercising his First Amendment rights"); *Goldstein* v. *Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (CA4 2000) ("[E]mployee must establish retaliation of some kind – that he was deprived of a valuable government benefit or adversely affected in a manner that, at the very least, would tend to chill his exercise of First Amendment rights."), cert. denied, 531 U.S. 1126 (2001); *Farmer* v. *Cleveland Pub. Power*, 295 F.3d 593, 602 (CA6 2002) (test is whether "the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that [constitutionally protected] activity"); *DeGuiseppe* v. *Bellwood*, 68 F.3d 187, 191 (CA7 1995) (the "complained-of action must be sufficiently adverse to present an actual or potential danger that the speech of employees will be chilled"); *Bass* v. *Richards*, 308 F.3d 1081, 1088

minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures." *Smith* v. *Fruin*, 28 F.3d 646, 649 (CA7 1994), cert. denied, 513 U.S. 1083 (1995). These seven circuits thus eschew any categorical limitation on the type of conduct that may constitute actionable retaliation. See, *e.g.*, *Coszalter*, 320 F.3d at 975 ("[A] government act of retaliation * * * need not be of a certain kind."). In particular, these courts have expressly rejected the position that "only adverse employment decisions, such as termination, suspension, or transfer, in retaliation for constitutionally protected speech are illegal." *Schuler* v. *Boulder*, 189 F.3d 1304, 1309 (CA10 1999). See also, *e.g.*, *Rivera-Jimenez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004); *Tao*, 27 F.3d at 639; *Power* v. *Summers*, 226 F.3d 815, 820 (CA7 2000).

The Fifth, Eighth, and Eleventh Circuits, on the other hand, hold precisely the opposite. Those three circuits categorically limit actionable retaliation to "adverse employment actions," which they define narrowly to include only actions such as "discharges, demotions, refusal to hire or promote, and reprimands." Pet. App. 13a-14a. See also *Breaux* v. *Garland*, 205 F.3d 150, 157 (CA5) (same), cert. denied, 531 U.S. 816 (2000); *Jones* v. *Fitzgerald*, 285 F.3d 705, 713 (CA8) (same).[2]

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(CA10 2002) (holding that "the government infringes upon protected activity whenever it punishes or threatens to punish protected speech," and asking whether action was "punishment that could inhibit speech and thus could infringe on [the plaintiff's] First Amendment rights"); *Tao* v. *Freeh*, 27 F.3d 635, 639 (CADC 1994) (applying majority rule).

[2] The Second Circuit has taken an intermediate view, generally agreeing with the minority's view of what constitutes an "adverse employment action," but permitting clams alleging that "the total circumstances of [the employee's] working environment changed to become unreasonably inferior and adverse when

Thus, in this case, the Eleventh Circuit specifically rejected the "likely to chill" test applied by the majority of circuits, holding that "[t]his standard is contrary to our precedents." Pet. App. 13a. The Court explained that "[w]hile it is true that a claimant must show a chilling effect on her protected speech, she must *also* show that this effect resulted from an adverse employment action," defined as an action that involves "an important condition of employment," *ibid.* (emphasis added), a category limited to "discharges, demotions, refusals to hire or promote, and reprimands," *id.* 14a. See also *Breaux*, 205 F.3d at 157 (same); *Jones*, 285 F.3d at 713 (same).

As noted in the petition, Pet. 6-7, this substantial conflict has been repeatedly acknowledged by the courts themselves. Pet. App. 14a n.8 (noting conflict with D.C. Circuit); *Pierce* v. *Texas Dep't Crim. Justice*, 37 F.3d 1146, 1150 (CA5 1994) (same), cert. denied, 514 U.S. 1107 (1995); *Rivera-Jimenez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004) (recognizing split between First and Fifth Circuits); *Lybrook* v. *Members of Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1340 n.2 (CA10 2000) (noting conflict); *Schuler*, 189 F.3d at 1309-10 (acknowledging, but rejecting, minority test).

The difference in legal standards is more than merely semantic; rather it consistently leads to different results for similarly situated employees in different circuits. See Pet. 13-17. Indeed, this point is aptly illustrated by the brief in opposition itself: respondents are able to defend the decision below only by relying on the narrow legal test applied by the minority circuits and rejected by the majority.

*Letter Chastising Petitioner For Her Dissenting Opinion.* The Eleventh Circuit held that respondents' letter chastising petitioner for publicly dissenting from a hiring decision was not actionable because it did not affect "an important

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compared to a typical or normal, not ideal or model, workplace." *Phillips* v. *Bowen*, 278 F.3d 103, 109 (2002).

condition of [her] job, such as her salary, title, position, or job duties." Pet. App. 17a. Respondents assert that a contrary holding would render "virtually any written guidance, advice or transfer of information from supervisor or employee actionable." BIO 13. Yet the majority circuits have held that such actions may, indeed, be actionable, so long as they are intended to have, and do have, a chilling effect on employee speech. See, *e.g.*, *Schuler*, 189 F.3d at 1310; *Lytle*, 382 F.3d at 987; *Belcher* v. *City of McAlester*, 324 F.3d 1203, 1207 n.4 (CA10 2003).

*Internal Investigation and Files.* The Eleventh Circuit likewise held that respondents' retaliatory internal investigation of petitioner was not actionable because it did not fall within the circuit's narrow list of adverse employment actions. Pet. App. 17a. The Fifth and Eighth Circuits have reached the same conclusion in other cases. See *Pierce*, 37 F.3d at 1150 (vindictive internal investigation not actionable); *Jones*, 285 F.3d at 714-715 (same); *Bechtel* v. *City of Belton*, 250 F.3d 1157, 1162 (CA8 2001) (same). In defending the Eleventh Circuit's decision, respondents argue that the investigation never led to the termination of petitioner's contract and, therefore, "the 'investigation' in itself was not related to anything even resembling an adverse action." BIO 14. But courts applying the majority rule have held that retaliatory investigations themselves may constitute actionable retaliation under the First Amendment. See *Rivera-Jimenez*, 362 F.3d at 94; *Coszalter*, 320 F.3d at 976-977; *Ulrich* v. *City & County of San Francisco*, 308 F.3d 968, 977 (CA9 2002).

*False Accusations of Mental Illness.* The court of appeals also held that even if false accusations of mental illness would deter petitioner from exercising her First Amendment rights, "this is not substantial enough to be actionable because it had no effect on an important condition of Stavropoulos's employment." Pet. App. 17a. Although that conclusion may be in accord with the minority view, see *Breaux*, 205 F.3d at 157-58, it conflicts with the decisions of

courts that apply the majority rule, see *DeGuiseppe*, 68 F.3d at 191; *Barrett* v. *Harrington*, 130 F.3d 246 (CA6 1997), cert. denied, 523 U.S. 1075 (1998).

Respondents attempt to show that even courts in the majority circuits would hold that a false accusation of mental illness, standing alone, is insufficient to state a First Amendment retaliation claim. See BIO 14-15. But that attempt fails. While majority courts readily acknowledge that not every false statement necessarily constitutes actionable retaliation, see, *e.g.*, *Nunez* v. *City of Los Angeles*, 147 F.3d 867, 875 (CA9 1998), none of the cases on which respondents rely holds that false accusations are a categorically insufficient foundation for a First Amendment claim. See *Awabdy* v. *City of Adelanto*, 368 F.3d 1062, 1071 (CA9 2004) (finding false accusation in addition to other acts sufficient to state a claim, but not discussing whether false accusation would be sufficient in itself); *Coszalter*, 320 F.3d at 976-977 (same). To the contrary, the decision in *Coszalter* explicitly reaffirms that "[t]o constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind." *Id.* at 975

*Negative Performance Evaluation.* Respondents further insist that subjecting petitioner to an unwarranted negative performance evaluation was constitutionally permissible because the evaluation was an "instance of day-to-day personnel management in an employment setting, not an 'adverse employment action.'" BIO 15. Applying the minority rule, the Eleventh Circuit agreed, concluding as a matter of law that negative performance evaluations can never be sufficient in themselves unless they lead to demotion, firing or another of the enumerated adverse employment actions. See Pet. App. 16a-17a; *Breaux*, 205 F.3d at 158-59. Courts applying the majority rule, however, have routinely held that retaliatory negative performance evaluations can be the basis of a First Amendment retaliation claim. See, *e.g.*, *Schuler*, 189 F.3d at 1310; *Ulrich*, 308 F.3d at 977; *Burgess*

v. *Independent Sch. Dist. No. I-4*, 65 Fed. Appx. 690, 694-95 (CA10 2003).

*Faculty Vote Not To Renew Contract.* Finally, respondents argue that the decision not to renew petitioner's teaching contract, even if done in retaliation for her speech, did not violate the First Amendment because the decision was eventually reversed after a lengthy, expensive grievance process. See BIO 16. Again, while that argument may be valid under the minority rule, see *Breaux*, 205 F.3d at 158 (rescinded reprimand not actionable), it conflicts with the legal standard in the majority of circuits, see, *e.g.*, *Tao*, 27 F.3d at 639 (forcing employee to reapply for promotion qualified as actionable retaliation, even if it did not ultimately result in denial of promotion).

## II. Certiorari Should Be Granted To Resolve The Circuit Conflict Over What Acts Of Retaliation Are Actionable Under Title VII.

Respondents also fail to refute petitioner's demonstration of a deep and enduring split of authority over the proper standard for actionable retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See Pet. 26-28. Nearly four years ago, the Solicitor General acknowledged that "[t]he courts of appeals have articulated different standards for what types of employer conduct are actionable" under Title VII's retaliation provision, 42 U.S.C. 2000e-3(a). Brief for the Respondent in Opposition, *Noland* v. *Henderson*, No. 00-1259, at 7. Indeed, the Eleventh Circuit itself long ago noted that "[t]here is a circuit split on this issue," *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (1998), an observation repeated many times by other courts since then, see *Von Gunten* v. *Maryland*, 243 F.3d 858, 865 (CA4 2001); *Ray*, 217 F.3d at 1240; *Burger* v. *Central Apt. Mgmt.*, 168 F.3d 875, 878 (CA5 1998). The difference in legal standards is substantial, the consequences important, and the disparity in treatment among public employees in different circuits untenable.

At the heart of the conflict is a dispute over the relevance of the difference in language between Title VII's anti-discrimination and retaliation provisions. See Pet. 29. Under the retaliation provision, it is "an unlawful employment practice for an employer *to discriminate* against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this title." 42 U.S.C. 2000e-3(a) (emphasis added). The EEOC has explained that this language is "exceptionally broad" and "in contrast to the general anti-discrimination provision[] which makes it unlawful to discriminate with respect to an individual's 'terms, conditions, or privileges of employment." *U.S. Equal Opportunity Comm'n Compliance Manual* 14 (May 1998) (available at http://www.eeoc.gov/policy/docs/retal.pdf) (quoting 42 U.S.C. 2000e-2(a)(1)). The retaliation provision, on the other hand, "set[s] no qualifiers on the term 'to discriminate,' and therefore prohibit[s] *any* discrimination that is reasonably likely to deter protected activity." *Ibid.*

The First, Seventh, Ninth, Tenth and D.C. Circuits agree with the EEOC and have taken a broad view of actionable retaliation under Title VII. The Ninth Circuit has expressly adopted the EEOC's standard and holds that retaliation is actionable if it "is reasonably likely to deter" protected activity. *Ray*, 217 F.3d at 1242-43. The First Circuit also has deferred to the EEOC's interpretation. See *Noviello* v. *City of Boston*, 398 F.3d 76, 90 (2005) (noting also that "this capacious reading of [Title VII's retaliation provision] is consonant with its purpose of 'maintaining unfettered access to statutory remedial mechanisms'"). Other circuits have applied similarly broad standards, rejecting attempts to limit retaliation claims to those directly affecting the terms and conditions of employment. See *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 986 (CA10 1996) (rejecting view that Title VII retaliation claims must be based on "formal practices linked to an existing employee/employer relationship" and permitting suit based on filing of false criminal charges); *Passer* v. *American Chem. Soc.*, 935 F.2d 322, 331 (CADC

1991) (noting that retaliation provision does not "reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion" and holding, instead, that all that is required is "conduct having an adverse impact on the plaintiff"); *Knox* v. *Indiana*, 93 F.3d 1327, 1334 (CA7 1996) ("The law deliberately does not take a 'laundry list' approach to retaliation.").

On the other hand, at least five circuits, including the Eleventh, have imported the "terms and conditions" qualifier from Title VII's anti-discrimination provision into the Act's retaliation provision. These courts have held categorically that retaliation that does not affect a term or condition of employment is permitted by Title VII. See *Torres* v. *Pisano*, 116 F.3d 625, 639-40 (CA2), cert. denied, 522 U.S. 997 (1997); *Robinson* v. *Pittsburgh*, 120 F.3d 1286, 1300 (CA3 1997); *Von Gunten*, 243 F.3d at 865; *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (CA8 1997); *Gupta* v. *Florida Bd. of Regents*, 212 F.3d 571, 587 (CA11 2000), cert. denied, 531 U.S. 1076 (2001). These courts are further divided with regard to what constitutes a retaliatory alteration of a term or condition of employment. The Fifth Circuit takes a particularly extreme position, recognizing only claims arising from "[u]ltimate employment decisions," defined as "acts 'such as hiring, granting leave, discharging, promoting, and compensating." *Burger*, 168 F.3d at 878. The Eighth Circuit has, at times, applied the same test, but other circuits that impose a "terms and conditions" requirement have explicitly rejected the Fifth Circuit's "ultimate employment decision" test. Compare, *e.g.*, *Manning* v. *Metro. Life Ins. Co.*, 127 F.3d 686, 692 (CA8 1997) with *Von Gunten* v. *Maryland*, 243 F.3d 858, 865 (CA4 2001) (rejecting "ultimate employment decision" test).

In this case, the Eleventh Circuit applied the more restrictive "terms and conditions" analysis to conclude that the retaliatory acts against petitioner – including the negative performance evaluation and attempt to block renewal of her contract – were not cognizable under Title VII's retaliation

provision because petitioner ultimately retained her position with the same pay and benefits. Pet. App. 11a. Courts that adhere to the broader interpretation of Title VII's retaliation provision, however, have held precisely the opposite. See, *e.g.*, *Smith* v. *Secretary of Navy*, 659 F.2d 1113, 1120 (CADC 1981) (negative performance evaluation actionable under Title VII); *Yartzoff* v. *Thomas*, 809 F.2d 1371, 1375-76 (CA9 1987) (same); *EEOC* v. *L.B. Foster Co.*, 123 F.3d 746, 754 (CA3 1997) ("An employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result."), cert. denied, 522 U.S. 1147 (1998); *Hashimoto* v. *Dalton*, 118 F.3d 671, 676 (CA9 1996) (retaliatory negative job reference actionable whether or not it actually prevented employee from obtaining new job), cert. denied, 523 U.S. 1122 (1998). Certiorari should be granted to resolve this conflict.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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